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In The
Supreme Court of the United States

OCTOBER TERM, 1952

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SUPREME COURT, U.S.

No. 14

ROBERT M. WIEMAN; NANCY KENT ZIEBUR; WERNER C. BAUM; SAMUEL HUNT LEE, JR.; MALCOLM CORRELL; LILLIAN A. SCHMOE, and LUELLA NIETZ,

Appellants,

VERSUS

PAUL W. UPDEGRAFF; THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES; A. S. J. SHAW, State Treasurer of the State of Oklahoma, and WILBURN C. CARTWRIGHT, State Auditor of the State of Oklahoma,

Appellees.

Appeal from the Supreme Court of the State of Oklahoma

BRIEF OF APPELLANTS

H. D. (DON) EMERY,
ROBERT J. EMERY,
Oklahoma City, Oklahoma,
Attorneys for Appellants.

AUGUST, 1952.

KING LAW BRIEF CO., 222 N.W. THIRD, OKLAHOMA CITY — PHONE 8-2969

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OPINION BELOW

The decision and opinion of the Supreme Court of Oklahoma is reported in ____ Okl. ____, 237 P. 2d 131.

As indicated, the decision and opinion has not yet been reported in the official Oklahoma Reports. The opinion appears in the Transcript of Record, Pages 59 to 69.

JURISDICTION

The judgment and decision of the Supreme Court of Oklahoma herein appealed from was entered October 18, 1951 (R. 59). Appellants' Petition for Rehearing was timely filed in the Supreme Court of the State of Oklahoma on October 31, 1951 (R. 70), and was denied by said court on November 6, 1951 (R. 100). Petition for Appeal to this Court (R. 96) was presented to the Chief Justice of the Supreme Court of Oklahoma and allowed January 18, 1952 (R. 100), within 90 days after said judgment and decision became final. The jurisdiction of this Court rests upon 28 U.S.C. 1257(2).

The Supreme Court of Oklahoma is the highest court of the State of Oklahoma. The judgment and decision appealed from is in favor of the validity of a statute of the State, which was and is drawn in question on the ground of its being repugnant to the Constitution of the United States, in the following particulars:

(a) Article 1, Section 10, prohibiting a State from impairing the obligation of contracts and prohibiting a State from passing a bill of attainder;

(b) The Fourteenth Amendment, providing that no State shall deprive any person of life, liberty or property without due process of law;

(c) Article 1, Section 8, delegating to the Congress the power to raise and support armies and provide and maintain a navy.

STATUTE INVOLVED

The statute of the State of Oklahoma, the validity of which is involved is "Enrolled House Bill No. 8, 23rd Legislature [Laws 1951; 50 O.S. 1941 (Supp.), Secs. 37.1-37.8]," and reads as follows:

"AN ACT

"ENROLLED HOUSE BILL NO. 8—By: SHIRLEY.

"An Act relating to public officers and public employees; prescribing an oath or affirmation to be taken by every officer and employee of the State, county, school district, municipality, public agency, public authority, or public district; providing for the filing of said oath or affirmation; providing that no fee shall be charged for administering said oath; prohibiting payment to any public officer or employee who has not taken said oath; providing that the taking of a false oath or affirmation shall be a felony and prescribing the penalty therefor; providing that any public officer or employee who after taking said oath or affirmation advocates or becomes a member of an organization advocating overthrow of the United States by unlawful means shall be guilty of a felony and prescribing the penalties therefor; repealing 51 O.S. 1941, § 32, as amended by § 1, Chapter 1, Title 51, Session Laws, 1945; and declaring an emergency.

"Be it enacted by the people of the State of Oklahoma:

"SECTION 1. Every officer and every employee of the State, county, school district, municipality,

public agency, public authority, or public district shall within the first thirty (30) days after taking office, or within the first thirty (30) days of such employment, take and subscribe to the oath or affirmation required by this Act. Persons now holding any such public office or public employment shall take said oath within thirty (30) days from the the effective date of this Act; provided, that public officers or public employees who are on authorized leave on the thirtieth (30th) day after the effective date of this Act shall take and subscribe said oath or affirmation within thirty (30) days after returning to work or to the duties of the office held by such person. Any officer or employee of the State, county, school district, municipality, public agency, public authority, or public district who fails to take and subscribe the oath or affirmation required by this Act within the time specified in this Section, shall forfeit his or her office or employment.

"SECTION 2. The oath or affirmation required by this Act shall be the following:

> I, ..., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of Oklahoma against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of Oklahoma; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.
>
> And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlaw-

ful means; that I am not affiliated directly or indirectly with the Communist Party, the Third Communist International, with any foreign political agency, party, organization or Government, or with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization; nor do I advocate revolution, teach or justify a program of sabotage, force or violence, sedition or treason, against the Government of the United States or of this State; nor do I advocate directly or indirectly, teach or justify by any means whatsoever, the overthrow of the Government of the United States or of this State, or change in the form of Government thereof, by force or any unlawful means; that I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary; that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member of the Communist Party, the Third Communist International, or of any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization, or of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlawful means.

And I do further swear (or affirm) that during such time as I am .....

(Here put name of office.

.....

or, if an employee, insert 'an employee of' followed by the complete designation of the employing officer, office, agency, authority, commission, department or institution.)

I will not advocate and that I will not become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlawful means.

Subscribed and sworn to before me this the ..... day of ....., 19.....

Notary Public, or other officer authorized to Administer Oaths or Affirmations.

The above provisions shall be cumulative to other requirements made by law.

"SECTION 3. The oath or affirmation required by this Act shall be filed by the officer or employee executing it with the officer, board, authority or commission having control of the office, agency, authority, department, commission, or institution in or for which the person executing the oath or affirmation is employed or appointed or to which said person is elected; and the officer, board, authority or commission having such control shall, in the case of a state office, agency, department, authority, or institution, file same with the Secretary of State, together with the oath or affirmation or oaths or affirmations of the said controlling officer, board, authority, or commission, and in the case of a county, school district, or municipal office, agency, authority, department or institution, such oaths or affirmations shall be filed by the controlling officer, board,

agency, authority, or commission with the county clerk. Every such controlling officer, board, agency, authority, or commission shall keep an official record of all such oaths or affirmations received by him or it, and filed with the Secretary of State or county clerk, as the case may be, as required by this Section.

"SECTION 4. The oath or affirmation may be taken before any officer authorized to administer oaths or affirmations. No fee shall be charged by any person before whom the oath or affirmation is taken and subscribed.

"SECTION 5. No compensation nor reimbursement for expenses incurred shall be paid to any public officer or employee by any public agency unless such officer or employee has taken and subscribed to the oath or affirmation required by this Act. It shall be the duty of the person certifying to public pay rolls to ascertain and certify that every officer or employee thereon has taken such oath or affirmation.

"SECTION 6. Every public officer or employee who, in taking and subscribing to the oath or affirmation required by this Act, states as true any material matter which he knows to be false, is guilty of perjury, and is punishable by imprisonment in the State prison not less than one (1) nor more than fourteen (14) years; and in addition thereto, shall forfeit any public office or employment held by such person.

"SECTION 7. Every public officer or employee having taken and subscribed to the oath or affirmation required by this Act, who, while holding such office, or while in the employment of, or service with, the State or any county, city, school district, municipality, public agency, public authority, or public district, advocates or becomes a member of any party or organization, political or otherwise, that advocates the overthrow of the United States or of the State of Oklahoma by force or violence or other

unlawful means, is guilty of a felony and is punishable by imprisonment in the State prison not less than one (1) nor more than fourteen (14) years; and in addition thereto, shall forfeit any public office or employment held by such person.

"SECTION 8. Section 32, Title 51, Oklahoma Statutes 1941, as amended by Section 1, Chapter 1, Title 51, Oklahoma Session Laws, 1945, is hereby repealed.

"SECTION 9. If any provision of this Act, or any word, phrase, clause, sentence, or other portion of the oath or affirmation set out in Section 2 of this Act, or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect the other portions, provisions or applications of this Act, or of said oath or affirmation, which can be given effect without the invalid portion, provision or application; and to this end the provisions of this Act, and of said oath or affirmation are declared to be severable.

"SECTION 10. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this Act shall take effect and be in full force from and after its passage and approval.

"Passed the House of Representatives the 21st day of March, 1951.

JAMES M. BULLARD
Speaker of the House of Representatives.

"Passed the Senate the 15th day of March, 1951.

JAMES E. BERRY
President of the Senate.

"APROVED by the Governor of the State of Oklahoma the 9th day of April, 1951.

JOHNSTON MURRAY
Governor of the State of Oklahoma.

OFFICE OF SECRETARY OF STATE:

"Received by the Secretary of State this 10th day of April, 1951, at 8:45 o'clock a.m.

By: JOHN D. CONNER

"Correctly Enrolled: WILLIAM L. JONES, Chairman, COMMITTEE ON ENGROSSED AND ENROLLED BILLS."

STATEMENT OF CASE

In making a statement of the case, the statute whose validity is called in question will be hereinafter referred to as the Act, and the oath required by the Act will be hereinafter referred to as the Oath.

This case was instituted in the District Court of Oklahoma County, Oklahoma, hereinafter called the trial court (R. 22), by appellee, Paul W. Updegraff, who filed his Petition as a citizen and taxpayer of the State of Oklahoma, against the Board of Regents of the Oklahoma Agricultural Colleges, A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, who were also plaintiffs in error in the Supreme Court of the State of Oklahoma, to enjoin the payment to all teachers, professors and other employees of the Board of Regents who failed to take and subscribe to the Oath required by the Act within thirty days from April 9, 1951, the effective date of said statute. The Board of Regents, the State Treasurer and the State Auditor, who were defendants in the trial court and represented by

the Attorney General of the State of Oklahoma, filed an Answer, admitting that defendant in error was a proper party to institute the suit, conceding the existence of valid contracts of employment of teachers, professors and other employees, including appellants, in effect during the fiscal year ending June 30, 1951, and alleging that the Act impaired the obligation of said contracts under the Oklahoma Constitution. The appellants, by permission of the trial court, filed separate Petitions of Intervention and, by permission of the court (R. 24), filed a consolidated Petition, alleging among other facts, that:

> "* * * Each intervenor is a citizen and subject of the United States of America and of the State of Oklahoma, a resident of Payne County, Oklahoma, and is now serving Oklahoma Agricultural and Mechanical College as follows: Intervenor Wieman is Assistant Professor of Philosophy; Intervenor Ziebur is Research Assistant for Research Foundation; Intervenor Baum is Assistant Professor of Botany; Intervenor Lee is Associate Professor of Chemistry; Intervenor Correll is Professor of Physics and Chairman of Physical Science; Intervenor Schmoe is a Secretary, and Intervenor Nietz is Assistant Professor of Music, each under a valid contract of employment with the defendant Board of Regents and with the Oklahoma Agricultural and Mechanical College, for a term commencing at a time prior to the effective date of an Act enrolled as House Bill No. 8, and passed by the 23rd Oklahoma Legislature; that said contract extends, according to its term, at least to the end of the current fiscal year; * * * that funds are lawfully available to meet the salary obligations of each of said contracts; that each intervenor has in all things complied with said contract, and has

done all things required by law in the performance thereof, and required by law as a condition precedent and as a condition subsequent to the right to receive compensation thereunder; that said contract does not require intervenor to take any oath of any kind or to do anything mandated by 'the oath' hereinafter referred to, or to refrain from doing anything proscribed by said Oath; that each intervenor has heretofore received payments monthly thereunder up to and including the month of April, 1951; that each intervenor is now ready, able and willing to perform, and is now performing, and will continue to perform services thereunder during the term thereof without interference from the defendant Board of Regents, or from any of its authorized agents; that this intervenor is entitled to receive payments thereunder and is entitled to have defendant Board of Regents direct its authorized agent, and to have the defendant, A. S. J. Shaw, as State Treasurer of the State of Oklahoma, and to [*have*] the defendant, Wilburn C. Cartwright, as State Auditor of the State of Oklahoma, to do any and all things lawfully necessary to be done to effect payment thereunder to this intervenor; and to each intervenor;

"That each intervenor is not a member of any organization, political or otherwise, that advocates, that he has not and will not advocate, the overthrow of the Government of the United States of America or of the State of Oklahoma, by force or violence, or unlawful means;

* * * * *

"That intervenor has not taken the Oath; that each intervenor, except Ziebur and Wieman, conscientiously and sincerely believes that war and the use of force between nations is contrary to the Will of God, and is forbidden by divine law, and that in obedience to these principles, and as a matter of religious faith and obligation, each intervenor, except Ziebur and Wieman, cannot and will not, because

> of his aforesaid religious convictions, bear arms against his fellowman; * * *." (R. 29 and 30).

By way of cross-action to appellee's Petition to enjoin payment to appellants, each appellant adopted the allegations set forth in said consolidated Petition in Intervention and prayed the judgment of the trial court that a mandatory injunction issue, compelling and requiring said Board of Regents, State Treasurer and State Auditor to do everything necessary to effect payment to each appellant for services performed under his contract of employment.

Each appellant alleged that a forfeiture of his contract and a denial of the payments due him under said contract as a result of the application of said statute would violate the constitutional rights of each appellant in several respects hereinafter stated, including the respects specifically set forth and specifically adjudicated by the Supreme Court of the State of Oklahoma. The Supreme Court of the State of Oklahoma considered and passed upon certain constitutional issues.

In deciding what issues were before it, the Supreme Court of the State of Oklahoma, in its decision and opinion, said:

> "Only those propositions asserted which are essential to determine whether or not the trial court erred in refusing injunctive relief to intervenors will be discussed." 237 P. 2d 131, 134; R. 61.

The Supreme Court of the State of Oklahoma entertained and considered specifically the contention of each appellant that the statute impairs the obligation of contract, contrary to Article 1, Section 10 of the Constitution of the United States. The court said in part:

> "The Act does not impair obligation of contract contrary to Article II, Section 15 of the Oklahoma Constitution and Article I, Section 10 of the Constitution of the United States.
>
> " 'All parties dealing with a sovereign power, or one of its functionaries, in the exercise of governmental power, the subject of which pertains to government (schools in this case), do so knowing it cannot contract * * * the power conferred for self-protection of self-preservation. The rule, therefore that the Legislature can pass no law impairing the obligation of contracts does not apply to parties dealing with a department of government concerning the future exercise of powers conferred for public purposes by legislative acts, where the subject-matter of the contract is one which affects the safety and welfare of the public.' " 237 P. 2d 131, 137; R. 66.

In passing upon the contention of each appellant that said statute took liberty and property without due process of law, the Supreme Court of the State of Oklahoma said in part:

> "The statute and the required loyalty oath do not deprive public officials and employees of property or liberty without due process of law. The intervenors are employees of the State as teachers in a public institution. They have no constitutional right to be so employed. They have no right to so serve the State except upon such terms as the State prescribes. The Act does not purport to take away their right

to teach. Public institutions do not have to hire nor retain employees except on terms suitable to them. *People* v. *Crane*, 214 N.Y. 154, 108 N.E. 427, L.R.A. 1916D, 550; *Heim* v. *McCall*, 239 U.S. 175, 36 S. Ct. 78, 60 L. Ed. 206, 207; *Ellis* v. *U. S.*, 206 U.S. 246, 27 S. Ct. 600, 51 L. Ed. 1047; *McAuliffe* v. *Mayor, etc. City of New Bedford*, 155 Mass. 216, 29 N.E. 517." 237 P. 2d 131, 137; R. 67.

In passing upon the contention of each of the appellants who entertain religious convictions against bearing arms, and that as to them said statute violated the due process clause of the Fourteenth Amendment to the Constitution of the United States, the Supreme Court of the State of Oklahoma said:

"It is alleged by some conscientious objectors that the required loyalty oath invades their freedom of religion guaranteed by both the State and Federal Constitutions. The part of the oath which it is alleged so invades this guaranty is 'that I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary' (that is, if by valid law required). The provisions of the Constitution against the enactment of any law prohibiting the free exercise of religion 'embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.' *Cantwell* v. *State of Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 903, 84 L. Ed. 1213. * * * The required oath does not invade one's constitutional right to the free exercise of religion guaranteed by Article I, Section 2 of the Oklahoma Constitution and the First Amendment of the Federal Constitution. For interesting reading on the subject see *Wooley* v. *Watkins*, 2

Idaho, Hasb., 590, 22 P. 102." 237 P. 2d 131, 138; R. 67.

In passing upon whether or not said statute constituted a bill of attainder in violation of Article I, Section 10 of the Constitution of the United States, the Supreme Court of the State of Oklahoma said:

> "An *ex post facto* law is one which provides a punishment for an act which was innocent when committed. Punishment is a necessary incident to either a bill of attainder or an *ex post facto* law. Punishment such as contemplated by the inhibiting clauses of the State and Federal Constitutions is not present here. The act is neither a bill of attainder nor an *ex post facto* law." 237 P. 2d 131, 138; R. 68.

In deciding that the requirements of the Act were reasonably related to its purpose, the Supreme Court of the State of Oklahoma, in summation, said:

> " ** * The Legislature had the power and duty to prescribe qualifications for teachers in our public institutions. The loyalty oath required as a prerequisite to payment for teaching in our public institutions cannot be said as a matter of law to be unreasonable, arbitrary, and capricious or to violate any constitutional rights guaranteed by either the State or Federal Constitutions. All parts of the loyalty oath required appear to be reasonably related to the purposes of the Act." 237 P. 2d 131, 138; R. 69.

The Supreme Court of Oklahoma completely ignored and refused to pass upon the constitutional issue raised in the 5th Assignment of Error (R. 93). This assignment pertains to Baum, Lee, Correll, Schmoe and

Nietz, who sincerely believe it is against the Will of God for one to bear arms against his fellowman. They asserted in their consolidated Petition in Intervention (R. 25, 28), in their Motion for New Trial (R. 45, 46), in their Petition in Error (R. 12, 15), and in their Motion for Rehearing (R. 70, 83), that the Act perforce the requirements of the Oath violated Article 1, Section 8 of the Constitution of the United States, delegating to the Congress the exclusive power to raise and support armies and provide and maintain a navy.

Additionally, the Supreme Court of the State of Oklahoma refused to consider and pass upon the issues raised in the 6th and 7th Assignments of Error, wherein the named appellants assert it denies each of them liberty and property without due process of law, to fail to extend to each of them the opportunity to take the Oath as interpreted (R. 93 & 94). This issue was raised in the Petition for Rehearing (R. 70, 77).

The record upon which the Oklahoma Supreme Court based its decision was made by stipulations entered into in writing between all parties, before the trial, and entered into orally during the trial in the trial court. The following are material parts of a stipulation (R. 42) entered into in writing and filed in the trial court and introduced as evidence:

> "It is hereby stipulated and agreed by and between the plaintiff, defendants and intervenors in the above cause that the plaintiff is a taxpayer and

citizen of the State of Oklahoma; that the teachers and professors referred to in the pleadings herein were employed by the Board of Regents for the Oklahoma Agricultural and Mechanical Colleges prior to April 9, 1951, to teach in the colleges referred to in the pleadings for and during the school year ending on or prior to June 30, 1951; that the other employees referred to in the pleadings were employed by the defendant, Board of Regents, prior to April 9, 1951, to perform services in the colleges referred to in the pleadings for prescribed periods exceeding thirty (30) days, but not necessarily for the entire school year 1950-51; that said employments were made by virtue of recommendations of employment by the Presidents of said colleges to the defendant, Board of Regents, which recommendations were approved or ratified by the Board after the beginning of the fiscal year ending June 30, 1951, after which said teachers, professors and employees entered into the duties of their respective employments, all of which is reflected in the official minutes of the board; that no written contracts of employment were executed by said teachers, professors and employees with said Board of Regents, except as the above procedure may constitute the execution of such contracts; * * * that the procedure above outlined is in accord with the customary and traditional practice of said board in effecting the employment of teachers, professor[s] and employees in said colleges; that funds are now lawfully available to pay the salaries of said teachers, professors and employees during the fiscal year ending June 30, 1951; that said teachers, professors and employees, including intervenors, have in all things complied with their respective employments and have done all things required by law in the performance thereof as a condition precedent and as a condition subsequent to the right to receive compensation therefor, except that same have not taken the oath set forth in Section 2 of House Bill No. 8 of the Twenty-

third Oklahoma Legislature; that said teachers, professors and employees, including intervenors, have heretofore received payment under their respective employments up to and including the month of April, 1951, and are now ready, willing and able to perform services under their respective employments; and that the intervenors, Baum, Correll, Hunt [Lee], Schmoe and Nietz hold religious convictions against bearing arms against their fellowmen.

* * * * *

"It is also stipulated that A. S. J. Shaw is the duly elected, qualified and acting State Treasurer of Oklahoma; that Wilburn C. Cartwright is the duly elected, qualified and acting State Auditor of Oklahoma; that the compensation of the teachers, professors and employees referred to in the pleadings is largely paid from State funds; * * *

"Dated this 17th day of May, 1951.

PAUL W. UPDEGRAFF,
Attorney for Plaintiff;

MAC Q. WILLIAMSON,
Attorney General of Oklahoma;

FRED HANSEN,
First Assistant Attorney General,
Attorneys for Defendants.

EMERY & EMERY,
By ROBERT J. EMERY,
DON EMERY,
Attorneys for Intervenors."

All parties also stipulated (R. 40) as follows:

MR. EMERY: "* * * May it be admitted by the Attorney General and counsel for the plaintiff, that each of the intervenors do not advocate and do not belong to any organizations that

advocate the overthrow of the Government of the United States or the State of Oklahoma by force and violence?

MR. UPDEGRAFF: No, I won't say that. I will say that each of them, if here to testify, would so testify.

MR. EMERY: Then, that their testimony as to the facts alleged in their consolidated petition in intervention may be considered as testimony in this case, as to all facts so alleged, without any challenge as to its competency?

MR. UPDEGRAFF: That's right.

MR. HANSEN: That is satisfactory.

THE COURT: If I understand you gentlemen correctly, there is no contention that any of these parties are Communists?

MR. UPDEGRAFF: No. We don't say that at all.

MR. EMERY: There is no contention as to that.

THE COURT: And, they have refused to sign this oath because they are unwilling to bear arms in defense of the United States.

MR. EMERY: That is one of the grounds, but there are several other grounds. The issues are much deeper than that.

MR. UPDEGRAFF: I don't stipulate that none of these people are Communists. I stipulate only that if they were put on the witness stand they would so testify, and their testimony to that effect be considered as evidence in this case."

The verified consolidated Petition was offered in evidence as proof of the facts therein alleged by agreement of all parties at the trial and was by the trial court admitted in evidence (R. 41).

All appellants, except Ziebur, took and subscribed to all parts of the oath as set forth *in haec verba* in the decision and opinion of the Supreme Court of the State of Oklahoma (R. 62).

The District Court in its judgment made the following findings of fact (R. 52):

> "The Court finds the facts in this case to be as set forth in the stipulations entered into by and between the parties, and that the parties have agreed that the case comes on for hearing on the permanent injunction."

By virtue of the trial court's findings of fact, it found as facts, all facts alleged in the consolidated Petition, and all facts set forth in the written stipulation and the stipulations made during the trial. This included the finding of the trial court,

> "* * * that each intervenor is not a member of any organization, political or otherwise, that advocates, that he has not and will not advocate the overthrow of the Government of the United States of America or of the State of Oklahoma, by force or violence or other unlawful means * * *."

The judgment of the trial court, among other matters, embraced the following:

> "6th
>
> "The Court concludes that the intervenors, and each of them, did not take and subscribe to the Oath as provided in Section 2 of the Act and wilfully refused to take that oath and by reason thereof the Board of Regents is enjoined from paying them, and their employment is terminated. It is so ordered." (R. 54).

"It Is Therefore Ordered, Adjudged and Decreed by the Court that the injunction should be made permanent in all things as set forth in the conclusions of law, and that intervenors' petition for mandatory injunction is in all things denied, and costs are assessed against the defendants and the intervenors. * * *" (R. 57).

SPECIFICATIONS OF ERROR INTENDED TO BE URGED

1. The Supreme Court of the State of Oklahoma erred in failing to hold that a statute of the State of Oklahoma, namely, Enrolled House Bill No. 8, 23rd Legislature [Laws 1951; 51 O.S. 1941 (Supp.) 37.1-37.8], violated the constitutional rights of each of the appellants, which statute prohibited payment of accrued salaries to each appellant due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each appellant to subscribe and file with designated authorities the Oath required by said statute, which Oath, among other things, is to the effect that each appellant swear that at any time within five years immediately preceding the enactment of said statute he had not been a member of any agency, party, organization, association or group whatever which had been officially determined, prior to the enactment of said statute, by the United States Attorney General or other authorized agency to be a communist front or subversive organization, in that the operation and effect of said statute as set forth above impaired the obligation of contracts, contrary to Article 1, Section 10 of the Constitution of the United States, providing that no State shall pass any law impairing the obligation of contracts (R. 90). Argued as Point VII.

2. The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional rights of each appellant, which statute

prohibited payment of accrued salaries to each appellant due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each appellant to subscribe and file with designated authorities the Oath required by said statute, which Oath, among other things, is to the effect that each appellant swear that at any time within five years immediately preceding the enactment of the said statute he had not been a member of any agency, party, organization, association or group whatever which had been officially determined, prior to the enactment of said statute, by the United States Attorney General or other authorized agency to be a communist front or subversive organization, in that the operation and effect of said statute as set forth above inflicts, without judicial trial, the punishment of loss of accrued salaries and forfeiture of employment, of each appellant, thus constituting said statute a bill of attainder, contrary to Article 1, Section 10 of the Constitution of the United States, providing that no State shall pass a bill of attainder (R. 91). Argued as Point I.

3. The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional rights of each appellant, which statute prohibited payment of accrued salaries to each appellant due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each appellant to subscribe and file with designated authorities the Oath required by said statute, which Oath, among other things, is to the effect that each appellant swear that at any time within five years immediately preceding the enactment of the said statute he had not been a member of any agency, party, organization, association or group whatever which had been officially determined, prior to the enactment of said statute, by the United States Attorney General or other authorized agency to be a

communist front or subversive organization, in that the operation and effect of said statute as set forth above inflicts, without judicial trial, the punishment of loss of accrued salaries and forfeiture of employment of each appellant, thus depriving each appellant of liberty and property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States providing that no State shall deprive any person of life, liberty or property without due process of law (R. 92). Not argued as a separate point.

4. The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional rights of each appellant, which statute prohibited payment of accrued salaries to each appellant due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each appellant to subscribe and file with designated authorities the Oath required by said statute, which Oath, among other things, is to the effect that each appellant swear that at any time within five years immediately preceding the enactment of said statute that he had not been a member of any agency, party, organization, association or group whatever which had been officially determined, prior to the enactment of said statute, by the United States Attorney General or other authorized agency to be a communist front or subversive organization, in that the operation and effect of said statute as set forth above inflicts, without judicial trial, the punishment of loss of accrued salaries and forfeiture of employment, of each appellant, thus having no reasonable relation to the purpose of said statute and thus depriving each appellant of liberty and property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, providing that no State shall deprive any person of life, liberty or property without due process of law (R. 92). Argued as Point II.

5. The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional rights of each appellant, which statute prohibited payment of accrued salaries to each appellant due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each appellant to subscribe and file with designated authorities the Oath required by said statute which, among other things, required that each appellant swear that he "will take up arms in defense of the United States in time of war or national emergency, if necessary" ("if necessary" was construed by said court to mean "if by valid law required"), in that the operation and effect of said statute as set forth above violates Article I, Section 8 of the Constitution of the United States, delegating exclusively to the Congress the power to raise and support armies and provide and maintain the navy, by interfering with the enforcement of a complete, comprehensive and fully integrated scheme enacted by the Congress as the Selective Service Act of 1948, and in effect at the time of the enactment of said statute (R. 93). Argued as Point IV.

6. The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional rights of each appellant due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each appellant to subscribe and file with designated authorities the Oath required by said statute, which Oath is so vague that men of common intelligence must guess at its meaning and differ as to its application, thus rendering the operation and effect of said statute as set forth above a deprivation of liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without

due process of law. The respects in which the Oath is vague appear, by virtue of the construction of the language of the Oath by the Supreme Court of Oklahoma in its said judgment and decision, as follows:

(a) By construing that "I am not affiliated directly or indirectly with * * * any foreign political agency, party, organization or government" as meaning any foreign political agency, party, organization or government officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization.

(b) By construing the language of the Oath, "that I am not affiliated directly or indirectly with" to mean "that I am not affiliated directly or indirectly with at the time of the passage of the Act."

(c) By construing the language of the Oath, "that within five (5) years immediately preceding the taking of the oath I have not been a member," to mean within the five years immediately preceding the passage of the Act, without regard to when the Oath is taken.

(d) The language of the Oath, "that I will take up arms in defense of the United States in time of War, or National Emergency, if necessary," means, in respect of the words, "if necessary," if by valid law required (R. 93). Argued as Point V.

7. The Supreme Court of Oklahoma committed error in failing to extend to each appellant, as a condition precedent to its affirmance of the judgment of the District Court of Oklahoma, the privilege of taking the Oath in the light of its construction of said statute as set forth in Assignment of Error No. 6. That such error constituted a violation of the constitutional rights of each appellant by taking his liberty and property without due process of law, in violation

of the Fourteenth Amendment to the Constitution of the United States (R. 94). Not argued.

8. The Supreme Court of the State of Oklahoma erred in failing to hold said statute violated the constitutional rights of appellants, Lee, Correll, Nietz, Schmoe and Baum, each holding sincere religious conviction opposing the bearing of arms against his fellow man, which statute prohibited payment of accrued salaries to each of said appellants, due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each of said appellants to subscribe and file the Oath with designated authorities required by said statute, which Oath, among other things, is to the effect that each of said appellants swear that he will take up arms in defense of the United States in time of war or national emergency, if necessary, in that the operation and effect of said statute, as set forth above, constitutes a law respecting the free exercise of religion, contrary to the Fourteenth Amendment to the Constitution of the United States providing that no State shall deprive any person of life, liberty or property without due process of law (R. 95). Argued as Point III.

SUMMARY OF ARGUMENT

The specifications of error will be presented in the order in which they appear in this summary of the argument, rather than in the order in which they appear as assignments of error in the Transcript of Record. This change, indicated in the record under each specification of error, is made in aid of a clearer presentation of the issues.

The following statement of facts is relevant to all points:

The Oklahoma law under attack, hereinafter called the Act, appearing in this Brief on Page 3, *et seq.*, is Enrolled House Bill No. 8, 23rd Legislature [Laws 1951; 51 O.S. 1941 (Supp.) 37.1-37.8].

The Act required, among other things, that public employees, including appellants, take an oath, hereinafter called the Oath. The only part of the Oath here under attack is a part of the second paragraph, which is the paragraph omitted in the *verbatim* statement of "the Oath" appearing in the opinion of the Supreme Court of Oklahoma (R. 62). The part of the second paragraph of the Oath under attack is:

> "* * * That I am not affiliated directly or indirectly * * * with any foreign political agency, party, organization or Government, or with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization; * * * that I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary; that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member of * * * any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization. * * *"

The Act provided that employees of the State, or an agency or subdivision thereof, including appellants, suffer two penalties for a failure to take the Oath within

30 days after the passage of the Act or after accepting employment. Section 1 provides for forfeiture of employment (this Brief, Page 3) and Section 5 prohibits the payment of compensation for such failure (this Brief, Page 7).

The District Court of Oklahoma County, Oklahoma, hereinafter called the trial court, forfeited the contracts of employment of appellants and denied them compensation accrued to the day of judgment (May 21, 1951) for failure to take the Oath (R. 54, 6th), and on such basis denied appellants mandatory injunctive relief requiring the Board of Regents of Oklahoma Agricultural Colleges, the State Auditor and the State Treasurer, to pay each appellant compensation under his contract of employment. The Supreme Court of Oklahoma affirmed the judgment of the trial court (R. 59, 69).

Substantially the same facts under the pleadings and proof in this case are relevant to all points, except that five appellants, namely, Lee, Correll, Schmoe, Nietz and Baum, refused to take the Oath, for the additional reason that they held sincere religious convictions contrary thereto, in that each believed it to be contrary to the Divine Will of God that he bear arms against his fellowman; whereas the Oath required a sworn promise to bear arms (R. 30-31).

Each appellant was an employee of the Oklahoma Agricultural and Mechanical College by virtue of a con-

tract made and entered into between each appellant and the Board of Regents for the College, prior to the effective date of the Act. The contract of employment, at a stipulated salary, of each appellant extended at least until the end of the then current fiscal year (June 30, 1951) (R. 25 & 41). At the time of the execution of each contract, no oath was required. Each appellant was ready, able and willing to perform his contract and did, with the consent of the Board of Regents, render services thereunder until the day of judgment, May 21, 1951 (R. 26), when each had his contract forfeited and each was denied accrued compensation for services rendered thereunder. Each appellant did all things required by law in the performance of his contract as either a condition precedent, or as a condition subsequent to his right to receive compensation thereunder, except that he did not take the oath for the reasons hereinafter stated (R. 26 & 43).

On the basis of the foregoing record, appellants contend:

POINT I

The Act, inflicting punishment of forfeiture of contract and denial of compensation, without judicial trial, is a bill of attainder, in violation of Article I, Section 10 of the Constitution of the United States, providing that no State shall pass a bill of attainder.

The Act as indicated above, by virtue of the requirements of the Oath, compelled each appellant, under the pain of forfeiture of his contract of employment and a denial of compensation earned thereunder, to foreswear membership within the last five years in any organization proscribed by the Attorney General of the United States as a communist front or subversive. Prior to its construction by the Supreme Court of the State of Oklahoma the Act apparently meant that the five-year period was a period immediately preceding the taking of the Oath. Under the interpretation of the Supreme Court of the State of Oklahoma, it is made clear that the Attorney General's determinations are only those made prior to the effective date of the Act, but it is not clear under this interpretation whether the jurator is required to foreswear his past membership during a five-year period immediately preceding the effective date of the Act or his past membership for five years immediately preceding the taking of the Oath (R. 63, 64). No opportunity is afforded to explain the circumstances of past membership or to rebut the presumption of disloyalty thus created. The presumption is conclusive.

As applied and enforced, bills of attainder are,

> "* * * legislative acts * * * that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment upon them without a judicial trial. * * *"
>
> *United States* v. *Lovett*,
> 328 U.S. 303, 315.

The Act is a Legislative Act

The Act Applies to Easily Ascertainable Members of a Class

Appellants are professors and employees of Oklahoma Agricultural and Mechanical College.

The Act Inflicts Punishment

The punishment inflicted is a forfeiture of contract of employment under Section 1 of the Act, and a denial of compensation for services performed under Section 5 of the Act. *United States* v. *Lovett, supra,* holds that cutting off pay is the kind of punishment essential to attainder.

The Act Inflicts Punishment Without a Judicial Trial

The trial court forfeited the employment contracts of appellants and denied each of them accrued compensation perforce Section 5 of the Act. This action was taken in making effective the punishment of the Act without affording appellants any opportunity to explain past membership after due notice and hearing, and by virtue of the conclusive presumption of disloyalty created by the Act as a result of past membership.

Cummings v. *Missouri,* 4 Wall. 277.

The attainder is more oppressive than it might otherwise be in that in the light of the subsequent interpretation given the Oath by the Oklahoma Supreme Court. Each appellant, as of the time he was required to take

the Oath, could only guess in what particular five-year period, if any, the proscriptions of membership were to have occurred. Additionally, as of the time of taking the Oath, he could only guess that the foreign agencies and governments in which membership was proscribed were to be only those foreign agencies and governments proscribed by the Attorney General. This interpretation of the Supreme Court of Oklahoma would have been, at the time, a bad guess; because the Attorney General had not then, so far as appellants knew, and has not to this day proscribed any foreign governments, including the Union of Soviet Republics, as a subversive government. Moreover, the appellants, holding religious convictions against bearing arms, could only guess that the words "if necessary" meant "if by valid law required."

Connally v. *General Construction Co.*, 269 U.S. 385.

POINT II

The forfeiture of appellants' contracts and the denial of accrued compensation thereunder for failure to take the Oath, denies appellants liberty and property without due process of law, because certain requirements of the Oath bear no reasonable relation to the purpose of the Act.

A denial of the right to perform a valid contract of employment and enjoy the fruits of such performance,

is a denial of liberty and property under the Fourteenth Amendment.

Prudential Life Ins. Co. v. *Cheek*, 259 U.S. 530, 536.

The purpose of the Act, according to the Oklahoma Supreme Court, is to make loyalty a qualification for public employment. In this connection, the requirement of the Oath that one foreswear past membership in organizations proscribed by the Attorney General as communist front or subversive, makes such past membership a conclusive presumption of disloyalty. Thus, each appellant had his contract forfeited and his accrued compensation due thereunder denied without being afforded an opportunity to rebut the presumptions of disloyalty, and to show that his membership was consistent with his loyalty. This was not a reasonable exercise of the protective powers of the State and gave the requirements of the Act an unreasonable relation to its purpose. Under such circumstances, the opportunity to rebut the presumption of guilt by past association is the very essence of due process, and the denial of this opportunity was a denial of due process secured by the Fourteenth Amendment.

Adler et al. v. *Board of Education of the City of New York*, ... U.S. ....., 72 S. Ct. 380;

Joint Anti-Facist Refugee Committee v. *McGrath, Attorney General of the United States et al.*, 341 U.S. 123, 137-139;

Coe v. *Armour Fertilizer Works*,
37 U.S. 413, 424;
Western & A.R.R. v. *Henderson*,
279 U.S. 639, 640;
Manley v. *State of Georgia*,
279 U.S. 1, 7.

POINT III

The Act, as applied to appellants, Lee, Correll, Schmoe, Nietz and Baum, each of whom sincerly believes that bearing arms against one's fellow man is contrary to divine law, by requiring each of them to promise under oath to bear arms, denies each named appellant his liberty without due process of law, contrary to the Fourteenth Amendment; because as to the named appellants, the Act is a law respecting the free exercise of religion.

The Act takes liberty by denying the free exercise of religion guaranteed by the Fourteenth Amendment, because the Act interferes with the free exercise of religion — it forfeits contracts and denies compensation thereunder for failure to take the Oath required by the Act. The Act interferes with the free exercise of religion, because self-enforced abstinence from conduct believed by the abstainer to be contrary to divine will is the practice of a religion. This interference occurs perforce the requirement of the Act, under the compulsions of the Act's penalties, that each appellant swear that he will take up arms in the defense of the United States in time of war or national emergency, if necessary.

The free exercise of religion protected by the First Amendment is protected by the Fourteenth Amendment.

Cantwell et al. v. *State of Connecticut*, 310 U.S. 296, 303.

Self-enforced abstinence from certain conduct in response to divine law is as much a religious practice as an affirmative act.

West Virginia State Board of Education et al. v. *Barnett et al.*, 319 U.S. 624, 638-639.

Freedom to follow religious practices by engaging in affirmative conduct and act is protected by the Fourteenth Amendment.

Niemotko v. *State of Maryland*, 340 U.S. 268;
Taylor v. *State of Mississippi*, 318 U.S. 583;
Murdock v. *Commonwealth of Pennsylvania*, 319 U.S. 105.

While presumptions are indulged in support of the constitutionality of State action as a general rule, an exception is State action interfering with the freedom to exercise one's religion in submission to what is sincerely believed to be divine will. In such a case, a State cannot constitutionally interfere unless it is to protect the health, peace or morals of the people of the State against a clear and present danger.

There is no legislative finding that a refusal to take an oath to bear arms on the part of public employees,

in any branch of the State Government or its administration in Oklahoma, who are religiously opposed to bearing arms, presents a clear and present danger to the interest of the people of the State that the State is competent constitutionally to protect. Nothing appears in the record to warrant such an assumption. In this connection reference is made to Judge Learned Hand's test adopted by this Court in *Dennis* v. *United States*, 341 U.S. 494, 510:

> "In each case [courts] must ask whether the gravity of the 'evil,' discontinued by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

There is no support in the history of the Act to warrant a conclusive presumption of disloyalty arising from one's failure, due to his religious conviction, to take an Oath to bear arms. Such a conclusive presumption does not bear any reasonable relation to the prevention, the thwarting or the frustration of any clear and present danger. Appellants' position in this regard is supported by the fact that the Congress, prior to the enactment of this Act, had passed the Selective Service Act of 1948 (62 Stat. 604, *et seq.)*, and later in 1951, enacted the Universal Military Training and Service Act (50 U.S.C.A., App. Sec. 451, *et seq.)*, exempting persons in the class of the named appellants from combat service, and under certain conditions, from non-combat military service.

POINT IV

The Act perforce the requirements of the Oath as applied to Lee, Correll, Schmoe, Nietz and Baum, in requiring each of them to take an oath to bear arms, when each holds sincere religious convictions contrary thereto, constitutes an unconstitutional interference with the exclusive powers of the Congress to raise and support armies and provide and maintain a navy, under Article 1, Section 8 of the Constitution of the United States, when antecedently to the passage of the Act the Congress, by law, had exempted such persons from the duty to bear arms.

The Act required an oath which, among other things, was to the effect that the jurator would promise to bear arms in the defense of the United States in time of war or national emergency, if necessary. Prior to the passage of the Act (April 9, 1951), the Congress of the United States had enacted the Selective Service Act of 1948, which, by Section 456(j) thereof exempted persons in the class of the named appellants from bearing arms. This same exemption appears in the Universal Military Training and Service Act passed by the Congress in 1951 [50 U.S.C.A., App. Sec. 456(j)]. In fact, such persons may, under prescribed circumstances, be exempted from non-combat military service. For the enforcement of this provision; in fact, for the enforcement of its entire scheme for military service, the Congress has enacted a complete, comprehensive and fully integrated scheme.

It is the contention of appellants that the requirement of the Oath that each swear to bear arms in defense of the United States frustrates the purposes and objectives of the Congress in exempting such persons from military service. *Hines, Secretary of Labor and Industry of Pa. et al.* v. *Davidowitz et al.*, 312 U.S. 52, 61, 67, 68 & 74. The subsequent interpretation by the Oklahoma Supreme Court to the effect that "if necessary" means "if by valid law required," did not save the Act from the unconstitutional interference with Congressional Policy.

POINT V

The Act perforce the requirements of the Oath denied appellants liberty and property without due process of law, in violation of the Fourteenth Amendment, by forfeiting contracts of employment and by denying payment of accrued compensation thereunder, because appellants failed to take the Oath when such failure was due to a serious and reasonable doubt as to its meaning.

Doubtless, men of ordinary intelligence, in the light of certain interpretations made by the Supreme Court of Oklahoma, could only guess at the meaning of the Oath and differ as to its application. *Connally* v. *General Construction Co.*, 269 U.S. 385. In fact, in the respects hereinafter set forth each appellant could not know the existence or non-existence of certain facts he was required

to foreswear, or the nature of the promise he was required to make.

Even though these same ambiguities may have been the basis of a defense to a charge of perjury instituted under Section 1 of the Act, the violation of which carried from one to fourteen years imprisonment, the appellants nevertheless would still be sorely perplexed as to the meaning of the language. This point is also made in reference to the following declarations in the Oath, regarded as ambiguous in the light of a subsequent interpretation by the State court or independently thereof. The Oath required a declaration "that I am not affiliated directly or indirectly * * * with any agency, party, organization, association or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization." Although the jurator is required to survey his present membership under this language, the Supreme Court of Oklahoma held that it referred only to determinations made prior to the passage of the Act.

The Oath also declared "that within five (5) years immediately preceding the taking of this Oath (or affirmation) I have not been a member * * * of any agency, party, organization, association or group whatever which has been officially determined by the United States Attorney General * * * to be a communist front or subversive organization." Here, again, the language requires

the jurator to survey the immediate present, both as to his membership and as to the Attorney General's determinations. Under the Oklahoma Supreme Court's interpretation, it is only those determinations made prior to the passage of the Act which are embraced; but it is still doubtful, under the interpretative language of the Oklahoma Supreme Court whether the jurator is to make a declaration about his present membership for five years immediately preceding the taking of the Oath, or for five years immediately preceding the effective date of the Act. Finally, the named appellants, holding a sincere religious conviction that bearing arms is contrary to divine will, were required to know that the words "if necessary" meant "if by valid law required." This part of the Oath required the jurator to swear that "I will take up arms in defense of the United States in time of War or National Emergency, if necessary."

POINT VI

The Act perforce the requirements of the Oath impaired the obligation of contracts, contrary to Article 1, Section 10 of the Constitution of the United States, in that the statutory forfeiture of said contract and the denial of the accrued compensation thereunder is effected by an unreasonable exercise of the reserved protective power of the State.

The contract of each appellant, not requiring any oath, was executed prior to the passage of the Act requiring the Oath (R. 25).

The obligation of the contract of each appellant was impaired as a matter of fact.

The impairment occurred perforce the provisions of Section 1 of the Act, which by legislative fiat forfeited the contract for failure to take the Oath as required by the Act, and again by Section 5 of the Act which denied the payment of compensation under contracts in effect prior to the time of the passage of the Act for the failure to take the Oath, as required by the Act. These provisions of the Oath were enforced by the trial court in its 6th Conclusion of Law (R. 54). The appellee Board of Regents was enjoined from paying appellants. In stating the legal results of the failure of each appellant to take the Oath, the trial court concluded "by reason thereof the Board of Regents is enjoined from paying them and their employment is terminated. It is so ordered" (R. 54). On this basis, the trial court denied injunctive relief seeking payment of accrued compensation (R. 57). The judgment of the Supreme Court of Oklahoma was:

> "The judgment denying injunctive relief to intervenors [appellants] on their cross-petitions is affirmed" (R. 69).

The contract of each appellant is protected by Article 1, Section 10 of the Constitution of the United States providing that no State shall pass any law impairing the obligation of contracts. A contract with an agency of the State, especially when it constitutes an

obligation to pay money, enjoys the protection of Article 1, Section 10.

Hall v. *State of Wisconsin*,
103 U.S. 302.

"When a State descends from the plane of its sovereignty and contracts with private persons, it is regarded *pro hac vice* as a private person itself, and is bound accordingly."

103 U.S. 302, 305.

See, also:

State of Mississippi for Use of Robertson v. *Miller et al.*, 276 U.S. 174, 178-179.

The contract obligation of each appellant is impaired in a constitutional sense, because the impairment results from an unreasonable exercise of the reserved protective power of the State.

The exercise is an unreasonable one, because the Act perforce the declarations of the Oath makes membership within five years immediately preceding the taking of the Oath in groups determined to be communist front or subversive by the Attorney General of the United States a conclusive presumption of disloyalty, affording each appellant no opportunity after notice and hearing to rebut such presumption. No appellant was afforded any opportunity to show that his membership may have been in an organization which was not subversive at the time of his affiliation, but later became subversive. He was denied the oppottunity to show that his affiliation occurred innocently. He was denied the opportunity to

show that a proscribed organization, originally subversive, was purged of its subversive character. He was denied an opportunity to show that after learning of the subversive character of an organization, he severed his membership.

Adler et al. v. *Board of Education of the City of New York, supra;*
Western & A.R.R. v. *Henderson, supra;*
Manley v. *State of Georgia, supra;*
State of Indiana ex rel. Anderson v. *Brand*, 303 U.S. 95.

The Act constitutes an unreasonable exercise of State power as to Lee, Correll, Schmoe, Nietz and Baum, who believe it to be contrary to divine will to bear arms. The Act makes the failure of such persons to swear to bear arms a conclusive presumption of disloyalty. This is especially unreasonable in view of the antecedently established policy of the Congress in the Selective Service Act of 1948 (62 Stat. 604, *et seq.)*, and again in the Universal Military Training Service Act (1951) (50 U.S.C.A., App. Sec. 451, *et seq.)*, exempting such persons as the named appellants from military service.

The Act is an unreasonable exercise of State power, because appellants, due to the ambiguities in the Act delineated under Point V, were unable to determine the five-year period within which membership created a conclusive presumption of disloyalty. If it were the five-year period immediately preceding the taking of the Oath,

each appellant could not know, due to procedures established by the Executive order requiring such determinations, what determinations had been made up to that time.

ARGUMENT

POINT I

The Act inflicting punishment of forfeiture of contract and denial of compensation without judicial trial, is a bill of attainder, in violation of Article 1, Section 10 of the Constitution of the United States providing that no State shall pass a bill of attainder.

SPECIFICATION OF ERROR

The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional rights of each appellant, which statute prohibited payment of accrued salaries to each appellant due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each appellant to subscribe and file with designated authorities the Oath required by said statute, which Oath, among other things, is to the effect that each appellant swear that at any time within five years immediately preceding the enactment of the said statute he had not been a member of any agency, party, organization, association or group whatever which had been officially determined, prior to the enactment of said statute, by the United States Attorney General or other authorized agency to be a communist front or subversive organization, in that the operation and effect of said statute as set forth above inflicts, without judicial trial, the punish-

ment of loss of accrued salaries and forfeiture of employment, of each appellant, thus constituting said statute a bill of attainder, contrary to Article I, Section 10 of the Constitution of the United States, providing that no State shall pass a bill of attainder.

ARGUMENT

The appellants, easily ascertainable members of a group, were employees of the Board of Regents of Oklahoma Agricultural Colleges, serving the Oklahoma Agricultural and Mechanical College at Stillwater. Each appellant was a citizen of the United States and a citizen of the State of Oklahoma (R. 25). No appellant was a member of any organization, political or otherwise, that advocates the overthrow of the Government of the United States of America, or the State of Oklahoma, by force or violence, or unlawful means; and no appellant had ever engaged in such advocacy (R. 26). Prior to the passage of the Act (April 9, 1951), each appellant had made and entered into a valid contract of employment with the Board of Regents and was rendering service thereunder (R. 25 & 42). His contract extended at least until the end of the then current fiscal year, June 30, 1951 (R. 25). Each appellant had in all things complied with his contract, had done all things required by law in the performance thereof, either as a condition subsequent, or as a condition precedent to the right to receive compensation (R. 43). No complaint, so far

as this record is concerned, was ever made against the conduct of any appellant. The contract under which each was rendering services did not require the taking of any oath; or the doing of anything required or prohibited by the Oath (R. 26). Each appellant continued with the consent of the Board of Regents to render services under such contract until May 21, 1951, which was the day of judgment, that enjoined the payment of compensation for services performed, that denied each appellant injunctive relief to compel the payment of compensation for services rendered, that declared a forfeiture of their contracts of nployment. Each appellant was ready, able and willing to perform, and was in a position to continue to perform the services required by his contract. These facts appear in the Stipulation (R. 42 & 43), and in the verified Consolidated Petition of the appellants (R. 25), which was received in evidence by stipulation of the parties in open court (R. 40). The trial court found these facts to be true. Its Findings of Fact were:

"FINDINGS OF FACT

"The court finds the facts in this case to be as set forth in the Stipulation entered into by and between the parties, and that the parties have agreed that the case comes on for hearing on the permanent injunction" (R. 52).

It is appellants' contention, that, under this record, the necessary operation and effect of the Act as applied

to appellants constituted a bill of attainder, in violation of Article 1, Section 10 of the Constitution of the United States.

Bills of attainder are,

> "* * * legislative acts * * * that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment upon them without a judicial trial. * * *."
>
> *United States* v. *Lovett*,
> 328 U.S. 303, 315.

The Act here involved is a legislative act that applies to easily ascertainable members of a group; namely, employees of a public agency, the Board of Regents of the Oklahoma Agricultural Colleges.

The Act inflicts punishmnt without a judicial trial.

Section 1 of the Act did not contemplate a judicial trial. The mere failure to foreswear past membership in organizations determined to be communist front or subversive by the Attorney General of the United States, worked a forfeiture of office by express declaration in Section 1 of the Act "Any * * * employee of [a] public agency * * * who fails to take and subscribe the oath or affirmation required by this Act within the time specified in this section, shall forfeit his or her office or employment." That the trial court construed the Act as accomplishing its intended results without a judicial trial is emphasized by the circumstance that nowhere in any pleading filed in this case did any party seek a forfeiture

of employment. The trial court applied the statutory forfeiture in its 6th Conclusion of Law:

> "The court concludes that the intervenors, and each of them, did not take and subscribe to the oath as provided in Section 2 of the Act and wilfully refused to take the oath and by reason thereof the Board of Regents is enjoined from paying them, and their employment is terminated. It is so ordered" (R. 54, 6th).

The Supreme Court of Oklahoma, in denying appellants mandatory injunctive relief, upheld the view of the trial court that the necessary operation and effect of the Act was that its intended results take place without a judicial trial.

Contrary to the holding of the Oklahoma Supreme Court, punishment of each appellant actually occurred for failure to foreswear past membership in the proscribed organizations. Under the Act the appellants were punished, because they refused to foreswear conduct occurring as long as five years prior to April 9, 1951, which embraced time prior to their contract of employment with the Board of Regents. The consequences of the Act were to occur, no matter whether past membership in any proscribed organization occurred in innocence of its evil purposes, or whether the past member, upon discovering its evil purposes, severed his membership, or whether the organization in which membership was proscribed was loyal at the time past membership commenced but later developed its evil design. The Act

offered appellants no opportunity to explain the conditions under which past membership occurred, and no opportunity to destroy the conclusive presumption of disqualification that occurred by reason of past membership, and no opportunity to overcome the presumption of guilt by association. Unlike the opportunities afforded teachers in the public school system in the State of New York by the Feinberg Law, *Adler et al.* v. *Board of Education of City of N. Y.*, ____ U.S. ____, 72 S. Ct. 380, here forfeiture of employment occurred perforce the provision of the Act without notice and a hearing to afford the opportunity to destroy the presumption of disqualification; and without notice and hearing to afford the right of the proscribed organization to explain its purposes.' The conclusive presumption was cast by the enactment of a law beyond the power of appellants to alter or change it. No matter how innocent the past conduct actually was, no matter how appellants may have been supplied with facts to rebut the presumption of disqualification, the facts were of no avail.

For ought that appears from the opinion of the Supreme Court of Oklahoma, the only reason the court did not pronounce the Act to be an attainder was that it held that a forfeiture of the contract of employment or a denial of compensation thereunder did not inflict punishment. The Oklahoma Supreme Court, in erroneously applying *Garner* v. *Board of Public Works of City of Los Angeles*, 341 U.S. 716, said:

"In upholding the ordinance requiring the taking of such an oath and holding that the ordinance was not a bill of attainder the United States Supreme Court said:

> 'We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment.'

"An *ex post facto* law is one which provides a punishment for an act which was innocent when committed. Punishment is a necessary incident to either a bill of attainder or an *ex post facto* law. Punishment such as contemplated by the inhibiting clauses of the State and Federal Constitutions is not present here. The act is neither a bill of attainder nor an *ex post facto* law." 237 P. 2d 131, 138.

The Oklahoma Supreme Court failed to discern that in the *Garner* case, the employees of the City of Los Angeles had become such *after* the enactment of a law by the State of California authorizing a municipality to require the oath in question as a condition of employment. It there clearly operated prospectively as a qualification for employment. As Mr. Justice Clark remarked, "not the law but the fact" was posterior. 341 U.S. 716, 721. In the case at Bar the contrary is true—the fact, *i.e.*, the contract of employment is anterior to the law. The conduct working a forfeiture here occurred prior to the passage of the Act. Nothing could be done by those condemned to rebut the conclusive presumption of disqualification in order to prevent a forfeiture of employment, or to preserve the continuing opportunity to re-

ceive compensation for services to be performed under a valid contract.

It is punishment to forfeit a contract conferring the right to perform services for compensation. It is punishment to be denied the payment of compensation for services performed with the consent of the employer; services performed consonant with the position of the Attorney General of the State of Oklahoma, who himself joined these appellants in contending before the Supreme Court of Oklahoma that the Act constituted a bill of attainder.

That this particular kind of punishment constitutes a punishment essential to attainder was held in *United States* v. *Lovett*, 328 U.S. 303.

In the *Lovett case*, it appeared that the Congress prohibited any further payment of compensation to named individuals, although there, as here, the employees were lawfully in the Government service.

The following is the Court's statement of the facts in *United States* v. *Lovett:*

> "In 1943, the respondents Lovett, Watson, and Dodd, were and had been for several years working for the Government. The Government agencies which had lawfully employed them were fully satisfied with the quality of their work and wished to keep them employed on their jobs. Over the protest of those employing agencies, Congress provided in Section 304 of the Urgent Deficiency Appropriation Act of 1943, by way of an amendment attached to the House bill, that after November 15, 1943,

no salary or compensation should be paid respondents out of any monies then or thereafter appropriated except for services as jurors or members of the armed forces, unless they were prior to November 15, 1943 again appointed to jobs by the President with the advice and consent of the Senate. 57 Stat. 431, 450. Notwithstanding the Congressional enactment, and the failure of the President to reappoint respondents, the agencies kept all the respondents at work on their jobs for varying periods after November 15, 1943; but their compensation was discontinued after that date. To secure compensation for this post-November 15th work, respondents brought these actions in the Court of Claims." 328 U.S. 303, 304.

In deciding that Section 304 was invalid because it constituted a bill of attainder, in violation of the Constitution of the United States, the Court analyzed and applied *Cummings* v. *Missouri*, 4 Wall. 277, hereinafter mentioned in the argument under this proposition. In concluding that the Act inflicted punishment without a judicial trial, the Court said:

"Section 304, thus, clearly accomplishes the punishment of named individuals without a judicial trial. The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal. No one would think that Congress could have passed a valid law, stating that after investigation it had found Lovett, Dodd, and Watson 'guilty' of the crime of engaging in 'subversive activities,' defined that term for the first time, and sentenced them to perpetual exclusion from any government employment. Section

> 304, while it does not use that language, accomplishes that result. The effect was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule.' The Constitution declares that that cannot be done either by a State or by the United States." 328 U.S. 303, 316.

Cummings v. *Missouri, supra,* did not involve a more oppressive technique. There, the United States Supreme Court held an act to be a bill of attainder that required certain classes of persons who had been sympathetic with, or fought with, or aided the side of the South during the Civil War, to swear that they had always been truly and loyally on the side of the United States against all enemies thereof, foreign and domestic.

Under Section 9 of the Act, lawyers and clergymen were required to take this oath before they could practice their profession. A Catholic priest refused to take the oath and was indicted.

In explaining why this section of the Missouri Constitution constituted punishment, the Court said:

> "The clauses in the Missouri Constitution, which are the subject of consideration, do not, in terms, define any crimes, or declare that any punishment shall be inflicted; but they produce the same result upon the parties against whom they are directed, as though the crimes were defined and the punishment was declared. They assume that there are persons in Missouri who are guilty of some of the acts designated. * * * They are aimed at past acts, and not future acts. * * * and they were intended to operate by depriving such persons of the right to hold certain

offices and trusts, and to pursue their ordinary and regular avocations. This deprivation is punishment; nor it is any less so because a way is opened for escape from it by the expurgatory oath. *The framers of the Constitution of Missouri knew at the time that whole classes of individuals would be unable to take the oath prescribed.* To them there is no escape provided; to them the deprivation was intended to be and is, absolute and perpetual. To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act. It is a misapplication of terms to call it anything else." 4 Wall. 277, 71 U.S. 356, 364. (Emphasis supplied.)

Dent v. *West Virginia*, 129 U.S. 114, and *Hawker* v. *New York*, 170 U.S. 189, cited with approval in *Garner* v. *Board of Public Works of City of Los Angeles*, 341 U.S. 716, are not in point. In the *Dent case*, a statute was upheld elevating standards of qualification to practice medicine. Any doctor practicing at the time that the Act was passed could continue to practice if he met the new standards. Whether he could meet them or not was well within his own power, subject always to his own control over his own future conduct. In the case at Bar, one must take an oath in reference to past conduct, conduct that cannot now be changed. In the *Hawker case*, a statute of the State of New York was upheld forbidding the practice of medicine by any person who had been convicted of a felony. There the past Act, which conditioned the right to practice medicine in

the future, was unlawful at the time it was committed. In the case at Bar, the acts proscribed occurred before the passage of the Act and worked a forfeiture of contract and a denial of compensation thereunder without regard to the legality of the acts when committed, and without opportunity to rebut the presumptions of disqualification thus created.

POINT II

The forfeiture of appellants' contracts and the denial of accrued compensation thereunder for failure to take the Oath, denies appellants liberty and property without due process of law, because certain requirements of the Oath bear no reasonable relation to the purpose of the Act.

SPECIFICATION OF ERROR

The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional rights of each appellant, which statute prohibited payment of accrued salaries to each appellant due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each appellant to subscribe and file with designated authorities the Oath required by said statute, which Oath, among other things, is to the effect that each appellant swear that at any time within five years immediately preceding the enactment of said statute he had not been a member of any agency, party, organization, association or group whatever which had been officially determined, prior to the enactment of said statute, by the United States Attorney General or other authorized agency to be a

communist front or subversive organization, in that the operation and effect of said statute as set forth above inflicts, without judicial trial, the punishment of loss of accrued salaries and forfeiture of employment, of each appellant, thus having no reasonable relation to the purpose of said statute and thus depriving each appellant of liberty and property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, providing that no State shall deprive any person of life, liberty or property without due process of law (R. 93).

ARGUMENT

It is repeated again that the failure of each appellant to take the oath required by the Act operated to forfeit his contract of employment and to deny him accrued compensation thereunder (R. 54, 6th). On this basis the trial court's denial of mandatory injunctive relief was affirmed by the Supreme Court of the State of Oklahoma. The contract of each appellant was entered into prior to the passage of the Act and extended at least until June 30, 1951 (R. 25). Each appellant had complied in every respect with all obligations thereunder (R. 25 & 26), and was ready, able and willing to continue his employment, and did, with the consent of the appellee, Board of Regents, render service thereunder until the day of judgment, May 21, 1951.

At the time the contract of each appellant was executed, he was not required to foreswear membership within five years immediately preceding the taking of the Oath in any organization officially determined by the

Attorney General of the United States to be communist front or subversive, nor was it required that he foreswear membership in any organization whatsoever.

It is appellants' contention, under this point, that each appellant is denied liberty and property without due process of law, because the following requirement of the Oath bears no reasonable relation to the purpose of the statute in prescribing loyalty as a qualification for employment by the appellee Board of Regents of the Oklahoma Agricultural and Mechanical College.

The requirement attacked by appellants under this point is that each appellant swear "that within five (5) years immediately preceding the taking of the oath," he was not a member of any group whatsoever which has been officially determined by the United States Attorney General to be communist front or subversive.

While appellants, under this point, urge principally that the conclusive presumption of disloyalty for failure to foreswear past membership precludes a reasonable relationship between the requirements of the Act and its purpose, it is later emphasized under this point that the conclusive presumption thus created becomes more oppressive and thus more unreasonable because appellants were not only required to foreswear past membership in certain organizations, but due to the circumstances of the case and the vagueness of the Oath, they were unable to determine what class of organizations, in respect of

time, was actually contemplated by the Oklahoma Legislature.

Assuming that each appellant could know the period of time within which past membership was fatal, the creation by the Act of a conclusive presumption of present disloyalty due to past membership precludes that reasonable relationship, between the requirement of the Oath and the purpose of the Act, that is necessary to accord due process under the Fourteenth Amendment to the Constitution of the United States.

The Oklahoma Supreme Court, declaring a State Government has the power to continue one's employment on its own terms, found the requirement to bear that reasonable relation to the statutory purpose that the Fourteenth Amendment demands (R. 67 & 69). On the other hand, each appellant urges that an act which does not afford him an opportunity to demonstrate that any past membership in any of the proscribed organizations did not bespeak disloyalty to the State or to the Nation, does not give the requirement a reasonable relation to the purpose of the Act, and for that reason offends due process.

The proscribed organization may have been loyal at the time one's affiliation occurred, and later became subversive. One's past affiliation may have occurred in ignorance of an organization's subversive purpose, or one innocent of a subversive organizational purpose at

the time his affiliation occurred, may have later severed membership when he learned of the organizational disloyalty. Additionally the United States Attorney General's finding of subversiveness may have been made without notice and hearing, or after notice and hearing but without any evidence to support his finding. While a particular person may not be able to rebut the presumptions of disloyalty by establishing any of the fact alternatives suggested above, it is the denial of the opportunity to do so after notice and hearing that makes the Oath requirement stand without reasonable relation to the statutory purpose.

The notice and hearing common to the Anglo-American judicial trial, affording an opportunity to rebut the presumption of the guilt by association, constitutes the very basis of fairness and reasonableness.

> "A person's right to a reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; * * *"
>
> *In re: Oliver*, 333 U.S. 257, 273.

When presumptions are raised and obligations are imposed because of one's relationship to an organization, he is entitled to an opportunity to rebut them. *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 424. Arbitrary determinations, that is, determinations made contrary to fact, even when made after notice and hearing cannot stand.

Joint Anti-Facist Refugee Committee v. *McGrath*, 341 U.S. 123, 137-139.

The Feinberg Law was sustained by this Court in *Adler et al.* v. *Board of Education of the City of New York*, 72 S. Ct. 380 (not yet officially reported), because, among other things, it afforded to teachers in the public school system of the State of New York the notice and hearing that was not provided by the Oklahoma Act. While the Oklahoma Supreme Court in the instant case held that the appellants' employment continues only upon terms satisfactory to the State (Board of Regents), this Court held in the *Adler case* that:

> "It is equally clear that they have no right to work for the State in the school system on their own terms. United Public Workers v. Mitchell, 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 754. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York." 72 S. Ct. 380, 384.

Again, in the *Adler case*, this Court, while sustaining as due process the evidentiary effect that disloyalty may be presumed from past membership in a particular organization, sustained the Feinberg Law only because the presumption therein was not made conclusive. In that connection this Court said:

> "The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has full opportunity to rebut it." 72 S. Ct. 380, 386.

After quoting the Court of Appeals of the State of New York concerning the meaning and effect of *prima facie* presumptions, this Court concluded:

> "Where, as here, the relation between the fact found and the presumption is clear and direct and *is not conclusive*, the requirements of due process are satisfied." 72 S. Ct. 380, 386. (Emphasis supplied.)

Relevant to this point is the Oklahoma Supreme Court's appraisal of the statutory purpose:

> "The real purpose of the Legislature was to make loyalty a qualification to hold public office or be employed by the State." 237 P. 2d 131, 136.

In doing what the Oklahoma Supreme Court said the Oklahoma Legislature did—that is, making past membership in certain groups a conclusive presumption of disloyalty, the State of Oklahoma thereby devised a test which did not bear a reasonable relation to the purpose of the Act.

In *Western & A.R.R.* v. *Henderson*, 279 U.S. 639, a Georgia statute, held offensive to due process under the Fourteenth Amendment, provided:

> "A railroad company shall be liable for any damages done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.'" 279 U.S. 639, 640.

This Court reversed a judgment for damages under this statute recovered by the wife for the death of her husband, killed at a grade crossing of a public highway and appellant's railroad, in a collision between a motor truck that the husband was driving and one of appellant's trains. The Court held:

> "A statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property." 279 U.S. 639, 642.

Additionally, the Act as construed by the Oklahoma Supreme Court permits membership in subversive organizations free from any presumption of disqualifying disloyalty *if found to be subversive* by the Attorney General *after* the passage of the Act. This absence of a reasonable relationship between the requirements of the Oath and the statutory purpose is accentuated by the fact that both past and present memberships, as of the time a person takes the Oath, in organizations found to be subversive after the passage of the Act, raises no presumption of disloyalty, either *prima facie* or conclusive.

But each appellant could not know what organizations had been proscribed by the Attorney General, either within the five years immediately preceding the taking of the Oath, or at any time prior to the effective date of the Act. Certainly each appellant as of the time he was

required to take the Oath could reasonably assume that the Act embraced determinations made within five years immediately preceding the taking of the Oath. This construction required each appellant to be informed right up to the time he was taking the Oath what determinations had been made. Under the circumstances it was impossible for appellants to know this. Under the pertinent Executive Order, the list of organizations proscribed by the United States Attorney General is not published by the Attorney General. The Executive Order, No. 9835, Part III, Sec. 3 (12 Fed. Reg. 1935, 1938), requires that the list be currently furnished by the Attorney General to the Loyalty Review Board. This list may be, and has been, very large. This Board may hold the list for days before making it public. A list, containing 95 organizations, furnished by the Attorney General, November 24, 1947, was not disseminated until March 20, 1948 (13 Fed. Reg. 1473). The consolidated list, supplied October 30, 1950, contained 211 organizations (15 Fed. Reg. 8145) and was not disseminated until November 29, 1950. Moreover, no publicity designed to give knowledge to the general public is contemplated by the Act. Neither does the Oklahoma Act charge any State official to acquire and have available such information for the benefit of one required to take the Oath (See Part III, Sec. 3 of Executive Order

No. 9385 set forth in *Joint Anti-Facist Refugee Committee* v. *McGrath*, 341 U.S. 123, 125).

It is not consonant with due process for men to be asked, on the pain of forfeiture of contracts and a denial of compensation thereunder, to swear to something that they cannot be expected to know. Such a declaration under oath can be nothing more than a belief; probably nothing more than a guess. To require one to swear to his beliefs under such circumstances denies due process.

It is no answer to say that the Supreme Court of Oklahoma construed the words "that within five (5) years immediately *preceding the taking of this oath* * * * I have not been a member of * * * any group whatever which has been officially determined by the United States Attorney General * * *," to mean those groups officially determined *prior to the effective date of the Act.* The State Supreme Court in referring to this language said:

> "It has no reference to organizations that may have been added by the Attorney General after the passage of the Act, and up to the time of taking the oath." (R. 63 & 64).

To say the least, such an interpretation is not one to be anticipated by one required to take an oath declaratory of the fact "within five years immediately preceding the taking of this oath."

Certainly the ordinary connotation of this language means that the period within which the Attorney General would have made his interpretation extended right up to the time the Oath is taken.

Even upon the assumption that appellants could have guessed that the Act only embraced determinations made prior to the effective date of the Act, appellants were not in a position to know or be informed of such determinations. They were required to take the Oath within thirty days from the effective date of the Act. Within that time the Attorney General could have made determinations not published until much later by the Loyalty Review Board, and then published only for use by Federal agencies.

The denial of liberty and property occurs because each appellant is denied the opportunity to perform a valid contract of employment and to enjoy the benefits of such performance. Freedom of contract has long been recognized as one of the liberties, and its fruits a specie of property, protected by the Constitution of the United States.

> "That freedom in the making of contracts of personal employment, by which labor and other services are exchanged for money or other forms of property, is an elementary part of the rights of personal liberty and private property, not to be struck down directly, or arbitrarily interfered with, consistently with the due process of law guaranteed by the 14th Amendment, we are not disposed to question. This court has affirmed the principle in recent cases. Adair v. United States, 208 U.S. 161, 174, 52 L. Ed. 436, 442, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Coppage v. Kansas, 236 U.S. 1, 14, 50 L. Ed. 441, 446, L.R.A. 1915C, 960, 35 Sup. Ct. Rep. 240."

Prudential Life Ins. Co. v. Cheek, 259 U.S. 530, 536.

Certainly the freedom to contract as a liberty protected by the Fourteenth Amendment against arbitrary action embraces the liberty to perform the contract according to its terms and to enjoy the fruits of such performance.

The purpose of the Act is to make political loyalty a qualification for holding public office or public employment in the State of Oklahoma. The test of disloyalty under the Act is one's failure to take an oath which creates a conclusive presumption of disloyalty due to past affiliations. The requirements of such an oath, which create a conclusive presumption of disloyalty by reason of past membership in an organization of a class only vaguely determinable by the jurator, does not bear a reasonable relation to the purpose of the Act.

POINT III

The Act, as applied to appellants, Lee, Correll, Baum, Schmoe and Nietz, each of whom sincerely believes that bearing arms against one's fellow man is contrary to divine law, by requiring each of them to promise under oath to bear arms, denies each named appellant his liberty without due process of law, contrary to the Fourteenth Amendment; because as to the named appellants, the Act is a law respecting the free exercise of religion.

SPECIFICATION OF ERROR

The Supreme Court of the State of Oklahoma erred in failing to hold said statute violated the constitutional rights of appellants, Lee, Correll, Nietz, Schmoe and Baum, each holding sincere religious conviction opposing the bearing of arms against his fellow man, which statute prohibited payment of accrued salaries to each of said appellants, due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each of said appellants to subscribe and file the Oath with designated authorities required by said statute, which Oath, among other things, is to the effect that each of said appellants swear that he will take up arms in defense of the United States in time of war or national emergency, if necessary, in that the operation and effect of said statute, as set forth above, constitutes a law respecting the free exercise of religion, contrary to the Fourteenth Amendment to the Constitution of the United States, providing that no State shall deprive any person of life, liberty or property without due process of law.

ARGUMENT

This point is urged by five of the seven appellants, namely: Lee, Correll, Baum, Schmoe and Nietz.

When appellants, prior to the passage of the Act (R. 25 & 42) contracted with the Board of Regents to render service to Oklahoma Agricultural and Mechanical College, no oath was required that the contracting parties take up arms in defense of the United States in time of war or national emergency, if necessary—in fact, no oath of any kind was required. Appellants, Lee, Correll,

Baum, Schmoe and Nietz (the two latter are women) alleged in their verified Consolidated Petition in Intervention, and in their cross-action (R. 30-31 & 32) that each "conscientiously and sincerely believes that war and the use of force between Nations is contrary to the Will of God and is forbidden by divine law, and that in obedience to these principles and as a matter of religious faith and obligation * * * cannot and will not, because of his aforesaid religious convictions, bear arms against his fellowman." These declarations made under oath were received in evidence as proof of the facts (R. 41) by oral stipulation of the parties and by order of the court (R. 41). They were also covered by the written stipulation of the parties (R. 43). The court found the facts to be as the parties had stipulated (R. 52).

It is the position of the named appellants, that is, all appellants, except Ziebur and Wieman, that the belief that it is against the Will of God for one to bear arms against his fellowman, is a religious belief and that the practice of abstinence from bearing arms against one's fellowman, pursuant to such belief, is the exercise of a religion. Additionally, appellants say that to require one who practices abstinence to swear that he will bear arms in the defense of the United States in time of war or national emergency, if necessary, is an interference with the free exercise of appellants' religion (the Supreme Court of Oklahoma construed the words "if necessary"

to mean if the Congress makes such requirement by valid law (R. 68)]. The interference with appellants' religious practice of abstinence is direct and coercive here, because under the Oklahoma Act requiring the Oath, appellants suffer forfeiture of their contracts of employment and a denial of compensation due thereunder, if each appellant does not take an oath to bear arms—that is, take an oath to do the thing he conscientiously and sincerely believes that his God forbids.

To prohibit the free exercise of a religion is a denial of liberty without due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. "The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. * * * Thus the Amendment embraces two concepts — freedom to believe and freedom to act." *Cantwell et al.* v. *State of Connecticut*, 310 U.S. 296, 303. The *Cantwell case* involved the exercise of a religion by affirmative acts—the distribution of religious periodicals and the oral exposition of ideas by phonograph records. Other decisions by this Court prohibiting State interference perforce the Fourteenth Amendment, with affirmative acts constituting the free exercise of religion are *Neimotko* v. *State of Maryland*, 340 U.S. 268; *Taylor* v. *State of Mississippi*, 319 U.S. 583; *Murdock* v. *Commonwealth of Pennsylvania*, 319 U.S. 105. A State cannot force a person to express

a disbelief in any religion. *People of State of Illinois ex rel. McCullom* v. *Board of Education*, 333 U.S. 203. But, here non-resistance—mere inaction—is the religious practice for which the appellants (except Ziebur and Wieman) seek protection. "Thou shalt not kill," to them, is an unqualified mandate of divine law. Moreover one need only remember that non-resistance was one of the pillars of the religious doctrine expounded by Jesus of Nazareth to know that abstinence from bearing arms against one's fellowman is a religious practice. In expounding the philosophy of religious liberty inherent in the Fourteenth Amendment, Mr. Justice Roberts, speaking for the Court in the *Cantwell case*, said:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.
>
> "The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in

> the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish." 310 U.S. 296, 310.

More closely akin to the case at Bar is the insistence upon the right to abstain from the flag salute involved in *West Virginia State Board of Education et al.* v. *Barnette et al.*, 319 U.S. 624. In this case the children of parents belonging to a sect known as "Jehovah's Witnesses" were expelled from school because, upon the religious ground hereinafter stated, they refused to salute the American flag while repeating "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all." Refusal to salute was based upon the religious belief that the flag salute violated that part of the First Commandment which, among other things, says, "Thou shalt not make unto thee any graven image * * *." The parents who advised their children not to give the salute and repeat the pledge were prosecuted and threatened with prosecution for causing delinquency. The children were either expelled or threatened with expulsion. In affirming a judgment of the United States District Court for the District of West Virginia, enjoining the enforcement of the regulations requiring the salute and the pledge, this Court said:

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

"In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. *Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard.* The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case." 319 U.S. 624, 638-9. (Emphasis supplied.)

It is only to prevent grave and immediate danger to interests which the state may lawfully protect that justifies State action designed to interfere with the free exer-

cise of a religion. But, the Supreme Court of Oklahoma said, in appraising the nature and purpose of the Oklahoma Act,

> "The real purpose of the Legislature was to make loyalty a qualification to hold public office or to be employed by the State." 237 P. 2d 131, 136,

and further that,

> "The Legislature had the power and the duty to prescribe qualifications for teachers in our public institutions. The loyalty oath required as a prerequisite to payment for teaching in our public institutions cannot be said, as a matter of law, to be unreasonable, arbitrary and capricious, or to violate any constitutional rights guaranteed by either the State or Federal Constitution. All parts of the loyalty oath required appear to be reasonable related to the purposes of the Act." 237 P. 2d 131, 138.

But, the Supreme Court of Oklahoma, in so doing, does not point to any clear and present danger which justifies the invasion of the religious liberty of appellants or to any express or implied legislative finding to that effect. No act of appellants is pointed to, neither does any implied finding of the Legislature warrant any conclusion that the teachers in universities and colleges, and other public institutions in Oklahoma, have attempted to teach their religion in the performance of their teaching services or have attempted to do anything that precipitates a clear and present danger to the State or to the Nation. On the other hand, the trial court has found as a fact that the appellants have conformed to the requirements of their contract in every respect.

In *Dennis* v. *United States*, 341 U.S. 494, the Supreme Court of the United States, in restating the "clear and present danger" concept as a justification for invading or limiting rights guaranteed by the First Amendment, adopted the test laid down by Judge Learned Hand as follows:

> " 'In each case [courts] must ask whether the gravity of the "evil" discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' " 341 U.S. 494, 510.

Under that test nothing appears in this record to afford any justification for the State of Oklahoma to forfeit contracts and deny compensation earned thereunder, merely because a teacher in a State university or college refuses to take an oath to bear arms against a fellowman when he sincerely believes such an oath and the practice contemplated thereby, would be a disobedience to God, and an infraction of the Word of God. The Act in this respect is, contrary to the judgment of the Supreme Court in the State of Oklahoma, unreasonable, arbitrary and capricious.

In *West Virginia State Board of Education et al.* v. *Barnette et al.*, 319 U.S. 624, this Court, in expounding "clear and present danger" that must exist to justify coercion of flag salute in violation of the freedoms of the First Amendment, said:

> "It would seem that involuntary affirmation could be commanded only on even more immediate

> and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." 319 U.S. 624, 633-634.

As indicated, the Supreme Court of Oklahoma apparently gave no consideration to the "clear and present danger" concept, and apparently concluded that while freedom to believe is protected by the First Amendment, freedom of action has no more protection than any other kind of human conduct, whether within or without the contemplation of the First Amendment.

Finally it should be observed that the Congress, that has supreme authority and responsibility in providing armed security for the Nation, has sensed no clear and present danger originating with persons believing it is against the Will of God to bear arms. As urged under Point IV of this Brief, the Congress itself has exempted persons in the class of appellants from military service. Rather than requiring an oath to bear arms, the Congress has enacted laws in obviation of such a requirement.

In *Girouard* v. *United States*, 328 U.S. 61, this Court gave cogent expression to the historical reason for the traditional policy of the Congress in respecting the free exercise of religion. In this case a construction

of the laws pertaining to naturalization was involved. The particular point was whether one otherwise entitled to become naturalized could be denied the privilege because he answered "no" to the question, "If necessary are you willing to take up arms in defense of this country?" This Court held that in the light of the traditional policy of the Congress to respect the free exercise of religion, nothing in the naturalization laws could be construed to require an affirmative answer to this question. What this Court said in the *Girouard case* has apt application here in determining whether the State of Oklahoma had on this record a constitutional basis, under the clear and present danger rule, for denying these appellants the exercise of their religion.

> "The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is moral power higher than the State. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle. * * * Over the years Congress has meticulously respected that tradition and even in time of war has sought to accommodate the military requirements to the religious scruples of the individual. We do not believe that Congress intended to reverse that policy when it came to draft the naturalization oath. Such an abrupt and radical departure from our traditions should not be implied. * * * Cogent evidence would be necessary to convince us

that Congress took that course." 328 U.S. 61, 68, 69.

POINT IV

The Act perforce the requirements of the Oath as applied to Lee, Correll, Baum, Schmoe and Nietz, in requiring each of them to take an oath to bear arms, when each holds sincere religious convictions contrary thereto, constitutes an unconstitutional interference with the exclusive powers of the Congress to raise and support armies and provide and maintain a navy, under Article 1, Section 8 of the Constitution of the United States, when antecedently to the passage of the Act, the Congress, by law, had exempted such persons from the duty to bear arms.

SPECIFICATION OF ERROR

The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional rights of each appellant, which statute prohibited payment of accrued salaries to each appellant due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each appellant to subscribe and file with designated authorities the Oath required by said statute which, among other things, required that each appellant swear that he "will take up arms in defense of the United States in time of War or National Emergency, if necessary," ("if necessary" was construed by said court to mean "if by valid law required"), in that the operation and effect of said statute as set forth above violates Article 1, Section 8 of the Constitution of the United States, delegating exclusively to the Congress the power to raise and support armies and provide and maintain the navy, by interfering

with the enforcement of a complete, comprehensive and fully integrated scheme enacted by the Congress as the Selective Service Act of 1948, and in effect at the time of the enactment of said statute.

ARGUMENT

This point is urged by five of the seven appellants, namely, Lee, Correll, Baum, Schmoe and Nietz.

When these appellants, prior to the passage of the Act (R. 25 & 42), contracted with the Board of Regents to render service to Oklahoma Agricultural and Mechanical College, no oath was required that the contracting parties would take up arms in defense of the United States in time of war or national emergency, if necessary —in fact, no oath of any kind was required. Appellants, Lee, Correll, Baum, Schmoe and Nietz (the two latter are women) alleged in their verified Consolidated Petition in Intervention, and in their cross-action (R. 30-31 & 32) that each "conscientiously and sincerely believes that war and the use of force between nations is contrary to the Will of God and is forbidden by divine law, and that in obedience to these principles and as a matter of religious faith and obligation * * * cannot and will not, because of his aforesaid religious convictions, bear arms against his fellowman." These declarations made under oath were received in evidence as proof of the facts (R. 41), by oral stipulation of the parties and by order of the court (R. 41). They were also

covered by the written stipulation of the parties (R. 43). The court found the facts to be as the parties had stipulated (R. 52).

Appellants asserted at every stage of this case that the requirement of the Oath constituted an unconstitutional interference with the power of the Congress under Article 1, Section 8 of the Constitution of the United States, to raise and support armies and provide for and maintain a navy (R. 4, 15, 28, 29, 46, 83).

The interference is direct and obvious in view of the fact that the Congress, in the exercise of such constitutional powers, has enacted a complete, comprehensive and fully integrated scheme embracing all conditions under which military service is to be rendered to the United States, and in this connection has exempted persons in the class of appellants from bearing arms. The Selective Service Act of 1948 provides [62 Stat. 609 (j)]:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who by reason of religious training and belief is conscientiously opposed to participation in war in any form."

The Universal Military Training and Service Act of 1951 provides:

> "Nothing contained in this title (Sections 451-454 and 455-471 of this Appendix) shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious train-

> ing and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an indivdual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. * * *" 50 U.S.C.A., App. Sec. 456(j).

Each of appellants come squarely under the exemption of the Selective Service Act of 1948 and the Universal Training and Service Act enacted in 1951. Moreover, Section 456j in each Act set forth following the declaration of exemptions is a procedural scheme under which conscientious objectors may be granted exemptions from combatant service and even non-combatant service.

Certainly the Congress in the enactment of this constitutional power was faced with the responsibility of accommodating its purposes to the seriously held religious viewpoints of persons entitled to constitutional protection. Of necessity the Congress attempted to enact legislation in the exercise of its war powers that would have the greatest possible support from all people of differing religious and political beliefs. Attempting to accomplish this purpose and in connection therewith to elicit the greatest possible support for its military policy from religious groups, the Congress adopted the policy of exemption to persons holding the indicated religious views, to be administered under a carefully devised procedure. After such a law is enacted by the Congress, definite interference ending in substantial frustration oc-

curs when the State of Oklahoma, in the face of congressional policy, harasses American citizens by requiring them to take an oath to do the very thing that the Congress has decided to exempt them from doing in developing by legislative enactment a uniform military policy. And it should be observed in this connection that the prosecution of modern warfare requires uniformity of treatment on a large scale that brooks no interference from one or more of the States of the Union.

To permit the Oklahoma Act to stand is surely contrary to Article 6 of Section 1 of the Constitution of the United States, providing that the Constitution and Laws of the United States made in pursuance thereof, shall be the supreme law of the land.

The Congress, vitally concerned with total public support for its military aims, decided that it should not coerce entry into the military service of the United States by persons like the named appellants who, in obedience to divine law, cannot take an oath to bear arms against their fellowman.

The fact that the Supreme Court of Oklahoma has given the "bear arms" provision of the Oath a meaning somewhat more clear than the statutory connotation does not lessen to any extent the character of interference with congressional policy that results from the compulsions of the Oath required by the Oklahoma Act. The ambiguity of the statutory language merely magnified the harassing effect of the Act.

The Oklahoma Supreme Court said the words "if necessary" meant that the jurating person only promised to bear arms if the Congress decided it was necessary. But this does not alleviate the harassment of persons in the class of appellants that the Congress was attempting to consider and protect. Compelling such persons to face the acute constitutional issue presented by the Oklahoma Act, constitutes an interference with congressional policy that at least for the present by-passes the constitutional issue by granting the exemption.

The position of appellants on this point is valid under the doctrine announced in *Hines, Secretary of Labor and Industry of Pennsylvania et al.* v. *Davidowitz et al.*, 312 U.S. 52. The following statement of facts is taken from the opinion:

> "This case involves the validity of an Alien Registration Act adopted by the Commonwealth of Pennsylvania. The Act, passed in 1939, requires every alien 18 years or over, with certain exceptions, to register once each year; provide such information as is required by the statute, plus any 'other information and details' that the Department of Labor and Industry may direct; pay $1 as an annual registration fee; receive an alien identification card and carry it at all times; show the card whenever it may be demanded by any police officer or any agent of the Department of Labor and Industry; and exhibit the card as a condition precedent to registering a motor vehicle in his name or obtaining a license to operate one. The Department of Labor and Industry is charged with the duties of classifying the registrations for 'the purpose of ready reference,' and furnishing a copy of the classification to the Pennsyl-

vania Motor Police. Non-exempt aliens who fail to register are subject to a fine of not more than $100 or imprisonment for not more than 60 days, or both. For failure to carry an identification card or for failure to show it upon proper demand, the punishment is a fine of not more than $10, or imprisonment for not more than 10 days, or both." 312 U.S. 52, 59.

After reviewing the complete and comprehensive treatment of alien registration that had been enacted by the Congress, the Supreme Court of the United States, Mr. Justice Black speaking, said:

"Having the constitutional authority so to do, [the Congress] has provided a standard for alien registration in a single integrated and all-embracing system in order to obtain the information deemed to be desirable in connection with aliens. When it made this addition to its uniform naturalization and immigration laws, it plainly manifested a purpose to do so in such a way as to protect the personal liberties of law-abiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance that might also generate the very disloyalty which the law has intended guarding against. Under these circumstances, the Pennsylvania Act cannot be enforced." 312 U.S. 52, 74.

That the Oklahoma Legislature, in requiring the Oath, was dealing with a different field of State policy —namely, qualifications for State office—than the field of national policy embracing military service, does not and cannot belie the direct interference with congressional purpose, resulting from enforcement of the Oklahoma Act. That direct interference occurs is the important

consideration. In *Hines* v. *Davidowitz, supra,* the Court said:

> "There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every Act of Congress. This Court, in considering the validity of State laws in the light of treaties or Federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 312 U.S. 52, 67.

That the Oklahoma Act stands as an obstacle to congressional purpose, there can be no doubt. That the Oklahoma law entrenches upon freedom of religious practice accentuates the interference.

> "And it is also of importance that this legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from State tax statutes or State pure food laws regulating the label on cans."
>
> *Hines* v. *Davidowitz,* 312 U.S. 52, 68.

Upon the enactment by the Congress of the Selective Service Act of 1948, the named appellants should be able to feel that implicit in Section 456j was a uniform na-

tional policy which could not be threatened by State action and that would prevent harassment through State legislation inconsistent therewith. The Supreme Court of the State of Wisconsin, in striking down as unconstitutional, attempted interference by the State of Wisconsin with the miltary policy of the Congress, held that a statute of Wisconsin granting a more liberal exemption from service of judicial process during military service than that granted by the Congress under the Soldiers' and Sailors' Civil Relief Act interfered unconstitutionally with the war powers of the Congress. *Konkel* v. *State of Wisconsin*, 170 N.W. 715. In the *Konkel case* the Supreme Court of Wisconsin said:

> "There is another principle applicable to the situation under consideration here, and that is that the regulation in respect to the service of civil process upon persons in the military service of the United States is of a purely national character. * * * The orderly administration of the affairs of the army and navy require that such regulations should be uniform. The military and administrative officers of the United States ought not to be required to look into the statute books of 48 separate States to determine what the privileges and immunities of United States soldiers are. Congress having, in the exercise of its constitutional powers, provided for the exemption of persons in the military service of the United States from process of civil courts of Wisconsin, it supersedes any like provision made by the State." 170 N.W. 715, 718.

POINT V

The Act perforce the requirements of the Oath denied appellants liberty without due process of law, in violation of the Fourteenth Amendment, by forfeiting contracts of employment and by denying payment of accrued compensation thereunder, because appellants failed to take the Oath when such failure was due to a serious and reasonable doubt as to its meaning.

SPECIFICATION OF ERROR

The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional rights of each appellant, which statute prohibited payment of accrued salaries to each appellant due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each appellant to subscribe and file with designated authorities the Oath required by said statute, which Oath is so vague that men of common intelligence must guess at its meaning and differ as to its application, thus rendering the operation and effect of said statute as set forth above a deprivation of liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law. The respects in which the Oath is vague appear, by virtue of the construction of the language of the Oath by the Supreme Court of Oklahoma in its said judgment and decision, as follows:

> **(a) By construing that "I am not affiliated directly or indirectly with * * * any foreign political agency, party, organization or government" as meaning any foreign political agency, party,**

organization or government officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization.

(b) By construing the language of the Oath, "that I am not affiliated directly or indirectly with" to mean "that I am not affiliated directly or indirectly with at the time of the passage of the Act."

(c) By construing the language of the Oath, "that within five (5) years immediately preceding the taking of the Oath I have not been a member," to mean within the five years immediately preceding the passage of the Act, without regard to when the Oath is taken.

(d) By construing the language of the Oath, "that I will take up arms in defense of the United States in time of War or National Emergency if necessary," to mean, in respect of the words "if necessary," "if by valid law required."

ARGUMENT

In stressing the problems presented to appellants by the ambiguities and vagueness of the Oath under this Point V, reference is first made to the basic infringements of appellants' constitutional rights under Points I (attainder), II (unreasonable relation), III (denial of religious liberty) and VI (impairment of contract obligation) and that the infringements become more acute when considered in connection with such ambiguities.

A jurator in the position of each appellant, faced with losing compensation for his services and a forfeiture

of his contract of employment for failure to take the Oath, is confronted with an oppressive dilemma when he cannot know the meaning of the facts implicit in the Oath he is required to take, either because the information is not or cannot be made available to him, or because he cannot with any certainty know the meaning of what he is uttering.

For example, each appellant was required to swear "that I am not affiliated directly or indirectly * * * with any foreign political agency, party, organization or government, or with any agency, party, organization, association or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization * * *."

In deciding what this meant, each appellant faced the fact that many organizations, not ordinarily taboo, are administered at times, and sometimes always, from a foreign office and a foreign seat of government. Among such organizations are the International Bar Association, the Canadian Bar Association, the British Bar Association, the Rotary Club, the Lions Club, scientific societies, church organizations, religious institutions, and the like. If the language of the Oath embraced such organizations he could not take it. He could not safely assume that only foreign organizations proscribed by the Attorney General were taboo. Moreover, to be in the proscribed

class, it was only necessary that he be "affiliated directly or indirectly."

In an apparent effort to obviate this dilemma, the Supreme Court of Oklahoma construed this language to refer only to foreign organizations or governments which had been officially determined to be communist front or subversive. But as to this, had the jurator had the time to investigate, he would have found that the Attorney General had never included foreign governments on his lists.

Additionally it is the position of each appellant that at the time he was required to take the Oath he had no way of knowing or surmising the meaning the Supreme Court of Oklahoma actually gave to the Act in reference to determinations made within a certain prior five-year period by the Attorney General of the United States, that particular groups are either communist front or subversive. In fact, not only is the Act in question vague and indefinite, but what the Supreme Court of Oklahoma said it meant in this reference is vague and indefinite. The Oklahoma Supreme Court construed the words of the Oath "that I am not affiliated directly or indirectly * * * with any * * * group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization" to refer "to a list or lists of such organizations

in evidence at the time of the passage of the Act which had been prepared by the Attorney General under governmental directive," and held that the Oath did not embrace membership in groups determined to be communist front or subversive prior to the taking of the Oath and after the passage of the Act (R. 63).

In reference to past membership in organizations, the State Supreme Court also held:

> "That part of the oath that says 'that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member of the Communist Party, * * *' refers to the same organizations listed by the Attorney General and in existence at the time of the passage of the Act. It has no reference to organizations that may have been added by the Attorney General after the passage of the Act and up to the time of the taking of the oath. The oath under this phrase is to the effect that affiant has not been a member of any of the organizations so listed by the Attorney General within the five year period previous to the taking of the oath." (R. 63-64).

In view of the last sentence of this quotation, it is not clear whether the jurator is required to swear that within five years *prior to the taking of the oath* he was not a member in any organization proscribed by the Attorney General for all time prior to the effective date of the Act, or whether he had not been a member within five years *prior to the effective date of the Act* in any organization proscribed by the Attorney General for all time prior to the effective date of the Act. It is at least obvious in the light of this interpretation that this language as used by

the Legislature was vague and indefinite, considered without regard to the State court's construction, or considered as words designed to express the meaning discovered by the Supreme Court of Oklahoma.

To make the same point differently, it may be said that one of common intelligence, required to take the Oath before the opinion was written, could hardly anticipate the ruling of the court, or might have anticipated that the court's ruling could have been either — all of which leaves the jurator in a considerable dilemma when faced with a forfeiture of his contract and denial of compensation for his failure to guess what the Supreme Court of Oklahoma would ultimately say that the Legislature meant. It placed the jurator in the position of not being able to determine whether the Legislature meant a determination made prior to the taking of the Oath, or made prior to the effective date of the Act. If made prior to the taking of the Oath, the jurator could not know what determinations were made because of the procedural course which the Executive Order of the President required the Attorney General to follow.

Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123, 125, and Footnotes 3, 4 and 5.

When language is vague, and if vague, the degree of vagueness, or when a discovered meaning of words could not be anticipated, is largely a matter of intuitive

judgment grounded in one's experience and in his acquaintance with the mother tongue and its application.

In the light of the cases hereinafter cited, it is believed that this Court cannot escape the judgment that the language used is unconstitutionally vague in the light of the State court's construction, or that the meaning given the words could not be anticipated or should not be required to be anticipated by a jurator required to take the Oath before the Act has been judicially construed.

As indicated above appellants urge this same point in respect of the language of the Oath, "that I am not affiliated directly or indirectly * * * with any foreign political agency, party, organization or government * * *." The jurator could not know, due to the punctuation of the Oath as it appeared in the Act, whether this meant *any* foreign group or only a foreign group which had been proscribed by the Attorney General. Appellants also make the same point of vagueness in reference to that part of the Oath requiring, "that I will take up arms in the defense of the United States in time of War or National Emergency, if necessary." The Supreme Court of Oklahoma said that the words "if necessary" meant if by valid law required (R. 68).

Due to vagueness, the challenged parts of the Oath fall under the application of the rule in *Connally* v. *General Construction Co.*, 269 U.S. 385. In the *Con-*

nally case an Oklahoma statute required construction companies, engaged in construction work for the State of Oklahoma, to pay wages to certain classes of employees that equalled the prevailing or average wage in the community where the work was being done. This statute was held void for indefiniteness. In referring to the lack of definite meaning of the words "prevailing or average wage in the community," the Court said:

> "* * * a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." 269 U.S. 385, 391.

In connection with all ambiguities of the Oath, the following bears repetition: the jurator could well assume that the Oath embraced organizations proscribed by the Attorney General up to the time the Oath was taken. The court below said the language of the Oath embraced organizations proscribed up to the time of the Act was passed and not after the Act was passed. In either event it was impossible for the appellants to know what determinations had been made. Under the pertinent Executive Order, the Attorney General's list of proscribed organizations was not published by the Attorney General. The Executive Order, No. 9835, Part III, Sec. 3 (12 Fed. Reg. 1935-1938), requires only that the list be currently furnished by the Attorney General to the Loyalty Review Board, which may pub-

lish it later. This list may be withheld several weeks before publication.

Additionally, under the lower court's construction, the jurator had to ascertain for himself the name of every organization proscribed for all time prior to the effective date of the Act. The jurator could not, without grave doubt as to the meaning of the Oath he was uttering, take it until after he had employed counsel to make prolonged search in the books in order that the identity and integrity of any particular list, imputed to the Attorney General, be determined.

POINT VI

The Act perforce the requirements of the Oath impaired the obligation of contracts, contrary to Article 1, Section 10 of the Constitution of the United States, in that the statutory forfeiture of said contract and the denial of the accrued compensation thereunder is effected by an unreasonable exercise of the reserved protective power of the State.

SPECIFICATION OF ERROR

The Supreme Court of the State of Oklahoma erred in failing to hold that a statute of the State of Oklahoma, namely, Enrolled House Bill No. 8, 23rd Legislature [Laws 1951; 51 O.S. 1941 (Supp.) 37.1-37.8], violated the constitutional rights of each of the appellants, which statute prohibited payment of accrued salaries to each appellant due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each appel-

lant to subscribe and file with designated authorities the Oath required by said statute, which Oath, among other things, is to the effect that each appellant swear that at any time within five years immediately preceding the enactment of said statute he had not been a member of any agency, party, organization, association or group whatever which had been officially determined, prior to the enactment of said statute, by the United States Attorney General or other authorized agency to be a communist front or subversive organization, in that the operation and effect of said statute as set forth above impaired the obligation of contracts, contrary to Article 1, Section 10 of the Constitution of the United States, providing that no State shall pass any law impairing the obligation of contracts.

ARGUMENT

1. The contract of each appellant, not requiring any oath, was executed prior to the passage of the Act requiring the Oath.

Each appellant, a citizen of the United States and of the State of Oklahoma had a valid contract of employment for a fixed compensation with the Board of Regents, ratified by the Board (R. 43) upon the recommendation of the President of the College (R. 43) entered into prior to the effective date of the Act, and extending at least until the end of the then current fiscal year (June 30, 1951) (R. 25). Appellant Wieman was Assistant Professor of Philosophy with tenure until September 1, 1951, at an annual salary of $3600.00 (R. 25). Appellant Lee was Associate Professor of Chemis-

try with tenure until December 1, 1954, at an annual salary of $4200.00 (R. 25). Appellant Baum was Assistant Professor of Botany with tenure until September 1, 1951, at an annual salary of $3600.00 (R. 25). Appellant Correll was Professor of Physics and Chairman of Physical Science with permanent tenure, at an annual salary of $6000.00 (R. 25). Appellant Nietz was Assistant Professor of Music with tenure until September 1, 1951, at an annual salary of $3000.00 (R. 25). Appellant Schmoe was a Secretary appointed February 1, 1951, whose contract extended until the end of the then current fiscal year, at an annual salary of $1,610.00 (R. 25). Appellant Ziebur was Research Assistant in the Research Foundation, appointed September 1, 1950, whose contract extended to the end of the then current fiscal year, at an annual salary of $900.00 (R. 25).

Each appellant complied in every respect with his contract of employment (R. 43). Each appellant was ready, able and willing to continue his employment and to continue to render service pursuant to the terms of his contract (R. 43). After the effective date of the Act, April 9, 1951, each appellant, with the consent of appellee, Board of Regents, continued to perform services under his contract until the judgment of the trial court on May 21, 1951, terminated the contract of each appellant, and enjoined the payment of his compensation

thereunder (R. 43). Funds are lawfully available to meet the salary obligation of the contract of each appellant (R. 43).

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2. The obligation of the contract of each appellant was impaired as a matter of fact.

Section 1 of the Act (this Brief, Page 3) provides that any employee who fails to take and subscribe to the Oath within the time required (30 days from April 9, 1951) forfeits his employment. Section 3 of the Act (this Brief, Page 6) provides that no compensation shall be paid to any employee unless he has taken and subscribed to the Oath. The trial court in its judgment entered pursuant to the Act, denied each appellant compensation and forfeited his contract of employment.

> "The court concludes that the intervenors [appellants], and each of them, did not take and subscribe to the oath as provided in Section 2 of the Act and wilfully refused to take that oath and by reason thereof the Board of Regents is enjoined from paying them, and their employment is terminated. It is so ordered." (R. 54, 6th).

The trial court accordingly denied each appellant mandatory injunctive relief requiring the State Treasurer, the State Auditor and the Board of Regents to pay compensation due each appellant under his contract, and enjoined the Board of Regents, the State Treasurer and the State Auditor from making payment (R. 57). This Act was affirmed by the Supreme Court of the State of Oklahoma (R. 69).

In defining the scope of its review, the Supreme Court of Oklahoma declared:

> "Only those propositions asserted which are essential to determine whether or not the trial court erred in refusing injunctive relief to intervenors [appelants] will be discussed." (R. 61).

The judgment of the Supreme Court of Oklahoma was:

> "The judgment denying injunctive relief to intervenors [appellants] on their cross-petitions is affirmed." (R. 69).

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3. The contract of each appellant is protected by Article 1, Section 10 of the Constitution of the United States, providing that no State shall pass any law impairing the obligation of contracts.

Contracts with an agency of the State, especially when they constitute an obligation to pay money, enjoy the protection of Article 1, Section 10 of the Federal Constitution, prohibting the passing of any law impairing the obligation of contracts. This prohibition applies to such contracts the same as it applies to contracts between two private persons. When a State obligates itself to pay money for services performed, under stipulated conditions, it assumes, in a constitutional sense, the character of a private person.

Hall v. *State of Wisconsin*,
103 U.S. 302.

In the *Hall case*, after Hall had been employed by the State of Wisconsin to make a geological survey under the authority of an act authorizing a contract for such

purpose, and after performance had commenced, the State Legislature repealed the act. After the repeal, Hall was refused compensation and brought this action to recover it.

In holding that the repeal statute impaired the obligation of contracts, the Supreme Court of the United States, citing a Wisconsin case closely applicable here, said:

> "In *Butler* v. *Regents of Univer.*, 32 Wis. 124, the same court held, without dissent, that a professor in the State University, appointed for a stated term with a fixed salary, was not a *public officer* in such a sense as prevented his employment from creating a contract relation between himself and the Regents." 103 U.S. 302, 305.

The Court reached its ultimate conclusion with these words, quoting Mr. Justice Story in *Dartmouth College* v. *Woodward*, 4 Wheat. 694:

> "'* * * But when the Legislature *makes a contract* with a public officer, as in a case of a *stipulated salary* for his services *during a limited period*, this, during the limited period, is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens.'" 103 U.S. 302. 305.

And speaking itself:

> "When a State descends from the plane of its sovereignty, and contracts with private persons, it is regarded *pro hac vice* as a private person itself, and is bound accordingly." 103 U.S. 302, 305.

In *State of Mississippi, for Use of Robertson* v. *Miller et al.*, 176 U.S. 174, it was held that the contract

impairment clause applied to a public officer who was denied compensation due for services performed.

In *State of Indiana ex rel, Anderson* v. *Brand*, 303 U.S. 95, the Supreme Court of the United States sustained the validity of an Indiana tenure statute and, treating it as a part of the teacher's contract of employment, held that its repeal violated the provision of the Federal Constitution prohibiting a State from passing any law impairing the obligation of contracts.

Although in the *Brand case* the judgment of the Supreme Court of Indiana was reversed to give the State court the opportunity to pass upon a demurrer upon non-Federal grounds, this Court stated the law of the case assuming that it would ultimately turn on Federal grounds, as follows:

> "Our decisions recognize that every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power but we have repeatedly said that, in order to have this effect, the exercise of the power must be for an end which is in fact public and the means adopted must be reasonably adopted to that end, and the Supreme Court of Indiana has taken the same view in respect of legislation impairing the obligation of the contract of a state instrumentality. The causes of cancellation provided in the Act of 1927 and the retention of the system of indefinite contracts in all municipalities except townships by the Act of 1933 are persuasive that the repeal of the earlier act by the later was not an exercise of the police power for the attainment of ends to which its exercise may properly be directed." 303 U.S. 95, 108-109.

4. The contract obligation as to each appellant is impaired in a constitutional sense because the impairment results from an unreasonable exercise of the reserved protective power of the State.

The exercise of power by the State of Oklahoma perforce the passage and enforcement of the Act is unreasonable in a constitutional sense, because it required each appellant to foreswear past membership in organizations proscribed by the Attorney General under circumstances under which appellant could not know what organizations had been proscribed. In this connection reference is made to the argument under Point II in which appellants urge that certain requirements of the Oath bear no reasonable relation to the purpose of the Act. Section 2 of the Act (this Brief, Page 4) required an Oath foreswearing, among other things, "that within five (5) years immediately preceding the taking of this Oath, I have not been a member of * * * any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General * * * to be a communist front or subversive organization."

Each appellant at the time he took the Oath (the required time was made within thirty days after the passage of the Act of April 9, 1951) could not know at that time what determinations had been made. Where it is necessary for each appellant, due to any conflict of time or circumstance, to take the Oath a day or so after

the passage of the Act, he could not know whether the Attorney General had made any determinations, either that day, the day before, or a week before the Act was passed. The Act did not require that a list be furnished containing the Attorney General's proscriptions, to any one required to take the Oath, including these appellants. As stated in the argument under Point II of this Brief at Page 63, the Attorney General was not required to publish his determinations. He was to supply them to the Loyalty Review Board. For ought that appellants knew, or may have known, or could have ascertained, he may have made a determination (unpublished), the hour, the day or the week prior to the time the Oath was taken.

If it be asserted that the Supreme Court of Oklahoma, construing the words, "immediately preceding the taking of the Oath," to mean "immediately preceding the passage of the Act," the answer is that each appellant—in fact, any person of ordinary intelligence—could not have anticipated the meaning ultimately discovered by the Oklahoma Supreme Court. Obviously the language of the Oath is ambiguous. The ordinary connotation of the words does not mean what the State court discovered that they meant. Certainly it would not be assumed that membership in subversive organizations, found to be such by the United States Attorney General after the passage of the Act, would raise no presump-

tion of disloyalty, when membership in such organizations so proscribed prior to the passage of the Act would raise a conclusive presumption of disloyalty. Morever, it could not have been surmised that the Legislature regarded as totally irrelevant membership in organizations found to be subversive after the passage of the Act, even though membership may have occurred prior to the passage of the Act. Each appellant would be logical and rational in assuming that if such determinations had a relevance to loyalty, proscriptions made after the passage as to organizations whose affiliation occurred prior thereto were included within the reaches of the Act.

It is hardly reasonable to demand from citizens of the United States, a prescience that would discover with certainty the meaning discovered by the Oklahoma Supreme Court.

The exercise of State power in this regard is the more unreasonable when the Act as here, is construed to deny appellants the opportunity to take the Oath after its meaning had been discovered by the State Supreme Court.

Every word of the Oath requires the jurator to relate his membership in organizations to the proscriptions of the Attorney General made as of the time the Oath is taken.

> "Undoubtedly, whatever is reserved of State power must be consistent with the fair intent of the constitutional limitation of that power. The re-

served power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. *This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them.*" (Emphasis supplied.)

Home Building & Loan Assn. v. *Blaisdell et al.*, 290 U.S. 398, 439.

Appellants say that an act that requires the jurator to foreswear past affiliation with groups in language, vague both as to time and as to circumstances, without giving the jurator an opportunity to rebut the presumption of disloyalty thus established, is not a reasonable exercise of the reserved protective power of the State.

But the exercise of State power is unreasonable for another reason. The denial to each appellant of the opportunity to rebut the presumption of disloyalty resulting from past membership in proscribed organizations is an unreasonable exercise of State power. This argument was presented under Point II of this Brief. It was there urged that a conclusive presumption of disloyalty from past membership precluded any reasonable relationship between this requirement of the Oath and the statutory proscription of loyalty as a qualification for public employment. It was there pointed out that this Court sustained the Feinberg Law against any attacks made in the *Adler case*, because the presumption

of disqualification there established was not conclusive in that an opportunity to rebut the presumption was afforded. But in the following cases it was pointed out that the statutory presumption of criminal liability in one and civil liability in the other denied due process, because the presumption was arbitrary in that a fair opportunity to repel the presumption was denied.

In *Western & A.R.R.* v. *Henderson*, 279 U.S. 639, a Georgia statute was held offensive to due process under the Fourteenth Amendment that provided:

> "A railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." 279 U.S. 639, 640.

This Court reversed a judgment for damages under this statute recovered by the wife for the death of her husband, killed at a grade crossing of a public highway and appellant's railroad, in a collision between a motor truck that the husband was driving and one of appellant's trains. The Court held:

> "A statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property." 279 U.S. 639, 642.

In *Manley* v. *State of Georgia*, 279 U.S. 1, there was involved a Georgia statute held by the Georgia Supreme Court to mean that upon proof of insolvency of a Bank, it is presumed to be fraudulent, and an accused president or director is presumed to be guilty in that the State is only required to prove that the bank was under the management and control of the accused, and that it became insolvent while it was within the management and control of the defendant, either by himself alone or conjointly with associates in its management. In the *Manley case*, like the case at Bar, there was involved a conclusive presumption of guilt based upon an indefinite standard. This Court in the *Manley case* said:

> "The presumption here involved does not rest upon any definite basis. It is raised upon proof of any one or more of the conditions described as insolvency and without regard to the facts from which such condition resulted. The statute does not specify the elements of the offense; and so the inference is not restricted to any particular point or specific issue. The facts so to be presumed are as uncertain and vague as the terms 'fraudulent' and 'fraud' contrasted with 'fairly,' 'legally,' 'honestly,' and 'in accordance with law,' when used to describe the management of a bank. * * * Nor is the generality of the presumption aided by the allegations of the accusation. The indictment merely follows the general words of the statute without specifying facts to disclose the nature or circumstances of the charge. * * * And as to guilt, also, the presumption is sweeping. It extends to all directors. There may be from 3 to 25. The president is required to be a director.

"The presumption extends to the *corpus delicti*, as well as to the responsibility of the president or director accused. The proof which makes a *prima facie* case points to no specific transaction, matter or thing as the cause of the fraudulent insolvency or to any act or omission of the accused tending to show his responsibility. He is to be convicted unless he negatives every fact, whether an act or omission in the management of the bank, from which fraudulent insolvency might result, or show that he is in no way responsible for the condition of the bank." 279 U.S. 1, 6-7.

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5. The contract obligation as to appellants, Lee, Correll, Baum, Schmoe and Nietz, each believing it to be against the Will of God for one to bear arms against his fellowman, is impaired because it is an unreasonable exercise of the reserve protective power of the State to forfeit their contracts of employment and deny them compensation thereunder for the failure of each of them to swear that he will bear arms.

Under Point IV of this Brief, it has been urged by each of the named appellants that as to him that part of the Oath requiring a promise to bear arms, under the pain of forfeiture of a contract of employment and the denial of compensation thereunder for services rendered, violates the due process provision of the Fourteenth Amendment in that under the circumstances this requirement of the statute is a law respecting the free exercise of religion. The cases cited under Point IV of this Brief are applicable here.

If this Court agrees with the view of these appellants that such is the necessary operation and effect of the

statute here under attack, then it follows that the Act in that respect is an unreasonable exercise of State power. It is an unreasonable exercise of State power to create a conclusive presumption of disloyalty for one's failure to take an oath to bear arms if such failure is due to the belief that such an oath is contrary to the Will of God. The forfeiture of the contract of each appellant or a denial to him of compensation due thereunder for services rendered would amount to an impairment of the obligation of that contract.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgdment of the court below should be reversed and that said judgment be reversed with directions to the Supreme Court of the State of Oklahoma that a mandatory injunction be issued, requiring the Board of Regents of Oklahoma Agricultural Colleges, A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, to make payment to each appellant under his contract of employment for amounts due to the end of the fiscal year ended June 30, 1951.

Respectfully submitted,

H. D. (DON) EMERY,
ROBERT J. EMERY,
Oklahoma City, Oklahoma,
Attorneys for Appellants.

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